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# Decisions

## April 82



REPORT  
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- 054



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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1982] OLRB REP. APRIL**

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**1673-81-R Sharon Hill and Solange Denault, Applicants, v. The Office and Professional Employees International Union Local 151 A.F.L. - C.L.C., Respondent, v. Anson General Hospital, Intervener.**

**Termination – Vice Chairman appointed to inquire and report on termination application under section 57(2) – Board finding petition voluntary on basis of report – Vote directed**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members B. Armstrong and F. W. Murray.

**DECISION OF THE BOARD;** April 1, 1982

1. This is an application under section 57(2) of the *Labour Relations Act*.
2. By a decision of the Board dated February 5, 1982, and pursuant to section 103(2)(h) of the *Labour Relations Act*, the Board appointed R.O. MacDowell, Vice-Chairman to conduct an enquiry into this application and to report his findings of fact to the Board. Those findings are as follows:

- (1) This is an application under section 57(2) of the *Labour Relations Act*. I have been appointed by the Board, pursuant to section 103(2)(h) of the Act, to inquire into this matter and report to the Board. A hearing for this purpose was held in Timmins, Ontario, on March 11, 1982. Although duly served with notice of the hearing, no one appeared on behalf of the respondent union. The testimony of the applicant employees was not contradicted.
- (2) The respondent union is the bargaining agent for a small bargaining unit of office employees at Anson General Hospital. The recognition clause in the latest collective agreement between the respondent and the intervener reads as follows:

“The employer agrees to recongize the union as the sole bargaining agency for employees of the Anson General Hospital engaged in office work; specifically those engaged in the occupations listed in Schedule ‘A’ attached, save and except the Administrator’s secretary.

Decisions concerning the inclusion or exclusion from the bargaining unit of new positions or positions of altered responsibility shall be based on the general lines established in the above mentioned Schedule ‘A’

Schedule “A” to the collective agreement and a list filed by the intervener indicate that there are three employees in this bargaining unit. Those three employees are: Sharon Peever, and the applicants Sharon Hill and Solange Denault.

- (3) Ms. Hill and Ms. Denault obtained the forms to initiate this pro-



ceeding from the Labour Relations Board. The application for termination is signed by both of them. There was no managerial involvement whatsoever. The application was their own idea. It is entirely voluntary. The collective agreement by which they were formerly bound has now expired and no efforts have been made to negotiate a new one. No notice to bargain has been delivered to the intervener. As the two employees put it, they seem to have been forgotten.

- (4) On the basis of the evidence adduced before me, I find that two of the three employees in the bargaining unit represented by the respondent have voluntarily signified in writing that they no longer wish to be represented by the union.

3. The Board adopts those findings of fact and in light thereof, the Board is satisfied that not less than forty-five per cent of the employees of Anson General Hospital in Iroquois Falls, Ontario, in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of November 19, 1981, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the Act.

4. The Board directs that a representation vote be taken of the employees of Anson General Hospital. Those eligible to vote are all employees of Anson General Hospital engaged in office work; specifically engaged in occupations, Clerk and Junior Clerk, save and except the administrator's secretary, 58 Anson Drive, Iroquois Falls, Ontario, in the Township of Calvert, in the District of Cochrane, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

5. Voters will be asked to indicate whether or not they wish to be represented by the respondent union in their employment relations with Anson General Hospital.

6. The matter is referred to the Registrar. In view of the size and geographic isolation of the bargaining unit, the Registrar is hereby authorized to conduct the representation vote by mailed ballot.

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**1309-81-R; 1329-81-U** Leonard Kitchen, Complainant/ Applicant v. United Food and Commercial Workers International Union and its Local 417, Donald Dayman, Devin Corporon, Gary Haycock, Art Miller, Steve Gibbs, Beth Gibbs, Gerald Rochleau, Allen Rosburgh, Respondents, v. **Beatrice Foods (Ontario) Limited** Malcolm Condensing Company Division, Intervener.

**Ratification Vote – Termination – Unfair Labour Practice – Whether union breaching Act by timing ratification vote so as to avoid filing of timely termination application – Whether employees coerced and intimidated into ratifying agreement – Whether exclusion of counsel for group of employees from union meeting unlawful – Board finding Act not violated**

**BEFORE:** Mr. G. Picher, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *W. Challis for the applicant/complainant; James Hayes and D. Dayman for the respondents; C. Eames and G. Weir for the intervener.*

**DECISION OF THE BOARD;** April 22, 1982

1. The Board hereby directs that the above application/ complaint be and the same are hereby consolidated.

2. This is an application for the termination of bargaining rights and a complaint under section 89 of the *Labour Relations Act* alleging violations of sections 68, 70, 72(4), 72(5) and 72(6) of the *Labour Relations Act*. The complaint alleges that the respondent union and its officers have violated the voting rights of employees in the taking of a strike vote and in a vote to ratify a collective agreement. It also alleges that they have intimidated and coerced employees into voting to accept a proposed collective agreement as a means of defeating their rights under the *Labour Relations Act*. The complaint requests broad relief, the effect of which would be to nullify a subsisting collective agreement between the respondent union and the intervener and to make timely the application for the termination of the union's bargaining rights. That application would be untimely if the collective agreement stands.

3. In September of 1980 the respondent union was certified as bargaining agent for the employees of the intervener in the village of St. George. The intervener's plant, involved in the production of dairy products, employs some 43 persons in the bargaining unit.

4. Negotiations for the first collective agreement concluded with the signing of a memorandum of settlement on June 16, 1981. The memorandum was made subject to ratification by the parties. On June 21, 1981, the respondent union conducted a ratification vote in respect of the proposed collective agreement. At that time, on the advice of its counsel, the union's officers did not allow employees who were not members of the union to vote. That resulted in a complaint under what was then section 79 of the Act being filed with the Board, a hearing for which was scheduled on August 12, 1981. At that hearing the union admitted, and the Board accepts, that it had erroneously excluded non-members from the ratification vote on the basis of mistaken legal advice. It appears that there was some uncertainty as to the meaning and application of the then recent amendments to the *Labour Relations Act* (Bill 89) which first extended the right to vote in ratification ballots to all employees under what is now section 72(5) of the Act. The complaint was settled, the union agreeing, among other things, to



conduct a new ratification vote on Sunday August 23, 1981 in which all employees would have the opportunity to vote, with a posting to that effect to be made in the plant from August 17, 1981. The union also agreed to allow the complainant's solicitor to attend the ratification meeting to ask questions and make comments on behalf of his clients.

5. The conditions of settlement were carried out. The Board is satisfied on the evidence that the union meeting, held at the Jolly Baron Inn in Brantford on August 23, 1981, afforded all employees the opportunity to attend, to ask questions and raise issues and to vote on the ratification of the proposed collective agreement. The union allowed the solicitor for the complainants, all of whom were known as opponents of the union dedicated to its removal from the plant, to attend, ask questions and make statements at the meeting. While the witnesses for the parties differed in their appraisal of the thoroughness of the discussion and explanation of the proposed contract, the Board is satisfied that the employees were given every reasonable opportunity to understand what they were voting on. During the course of the meeting Mr. Donald Dayman, the union's representative, advised the members of the bargaining unit that if the ratification vote did not pass the union would then put a strike vote to those in attendance. The ratification vote was taken by secret ballot in circumstances which satisfy the Board that the choice of an individual employee could not be identified. In the result 20 ballots were cast against ratification and 14 in favor. On the strike vote that was then taken 29 ballots were cast in favor of strike action and 5 ballots were opposed.

6. Much evidence and argument was directed to the significance of these two votes. The theory of the complainants is that the union's first wish was to have the contract accepted; by reaching a collective agreement the union would foreclose the possibility of a timely application to terminate its bargaining rights. Having been certified on September 11, 1980 and with conciliation and a no Board report behind it the union would be vulnerable to such an application on the anniversary date of its certification pursuant to the provisions of section 61(6) of the *Labour Relations Act*. Alternatively, if no collective agreement were concluded but a lawful strike were commenced before the anniversary date a termination application could not be timely for a further period of six months pursuant to the provisions of section 61(3)(a) of the *Labour Relations Act*. The complainants submit that the union did not have the popular support of the employees, that it knew that they did not want to have a collective agreement or a strike and that it deliberately manipulated the ratification and strike vote procedures to intimidate and coerce employees into accepting the terms of a collective agreement.

7. That is a conclusion which, in our view, is extremely difficult to draw from the evidence before the Board. Before dealing with the evidence it should be stressed that intimidation and coercion are the elements which must be established to make out a violation of the Act by the union. There is nothing unlawful in a trade union using normal vigilance and alert planning to preserve and protect its bargaining rights; in our view the timing of a ratification or a strike vote to coincide with the approaching anniversary of certification is a reasonable union business practice predicated on the scheme of the Act. We do not see how a union can be faulted for exercising prudence in the timing of its affairs in a way that maximizes its own interests.

8. Counsel for the complainants submits that the events giving rise to this complaint can be appreciated only once it is accepted that the employees in the bargaining unit do not want the union to represent them. To this end he sought to adduce a petition, filed in support of the termination application, expressing the desire of some 24 employees that they no longer

wish to be represented by the trade union. He also sought to adduce in evidence a separate petition signed by 28 employees stating that they do not want to strike. Counsel for the union did not object to the “no strike” petition being admitted in evidence. He did oppose, however, the Board hearing evidence of a petition of non-support for the union other than in a timely termination application.

9. The use which counsel for the complainants wished to make of these petitions was fairly convoluted. In the event that the section 89 complaint should fail, causing the termination application to be untimely, he requested the Board to admit the termination petition as a basis to reconsider its certification of the applicant in September of 1980. His main submission, however, was that the termination petition should be admitted for the purposes of the section 89 complaint to establish that on August 23, 1981, the date of the ratification and strike votes, the union did not have the support of the employees in the bargaining unit. He submits that that conclusion is vital to his allegation that the employees were manipulated, coerced and intimidated by the union.

10. The Board has grave concerns with both the policy implications and the logic underlying the submission of counsel for the complainants. To deal with his arguments in our view it is most expeditious to view the petition as being voluntary for the purposes of the complaint. What then, is its relevance? The right of a union to act as exclusive bargaining agent for all of the employees in the bargaining unit can be questioned neither by the employer nor by the employees once a Board certification has issued until such time as the union’s bargaining rights have been lawfully terminated under the Act. So long as the union’s bargaining rights endure, as they did in this case, it is bound to represent the employees to the best of its ability in bargaining with the employer. That is so whatever level of confidence it might enjoy among the employees at any given point in time. The union had an obligation to represent the employees and a right to do so in a way that protects its own interests and bargaining rights. The issue in these proceedings is whether it has done so lawfully. The degree of the support which the union enjoyed among the employees at the time the ratification vote was taken in the instant case is not relevant to the issues which the Board has to decide. On that basis the Board declined to entertain lengthy evidence as to the originating and circulation of the petition for the purposes of the section 89 complaint. For the purposes of this complaint, however, we are prepared to assume that the union’s popular support was as the complainants allege. If the application for termination were found to be timely the petition would, of course, become relevant and detailed evidence in respect of it would be entertained.

11. Counsel for the union did not object to the admission of the “no strike” petition filed by the complainants. Signed by 28 employees on September 8 and 9, 1981 it bears the preamble: “We, the undersigned employees of Malcolm Condensing Company do *not* want to strike”. The Board takes that petition as establishing that the persons who signed it did not want to strike. What more does it establish? Employees seldom embrace the prospect of invoking the strike sanction with all the personal hardship it implies. They may, however, do so reluctantly because they perceive that their industrial relations goals leave them no alternative. There is nothing intrinsically contradictory in an employee voting freely to support a union mandate to strike, a threat that may of itself be of some value in bargaining, while just as freely signing a petition such as the one tendered by the complainants.

12. With the ratification rejected and a strike mandate in its possession the union resumed negotiations with the company. In that round of bargaining the company made



further concessions, some of them substantial, in the area of benefits. On September 3, 1981 a revised memorandum of agreement was signed between the parties. On September 4, 1981 the union gave written notice to the employees advising them of the changes that were negotiated in the memorandum of agreement. On Tuesday September 8, 1981 the union met with the employees in the bargaining unit to explain the terms of the revised memorandum of settlement. Although he was not invited, the solicitor for the complainants attended for the purpose of directing questions and comments regarding the revised proposed collective agreement. The union officers in attendance advised him that the meeting was for employees only and requested him to leave, which he did.

13. Counsel for the complainants suggested in his argument that his rejection from the union meeting is evidence of further coercion, intimidation and manipulation of the employees by the union. We disagree. As one of the complainants himself testified it would bring the affairs of trade unions to a standstill if each member or factions of members had an absolute right to participate in union meetings through their legal counsel. On the whole the Board is left with the unfortunate impression that Mr. Challis attended the meeting on the chance of creating self-serving evidence. It is clear on the evidence that at the meeting of September 8, 1981, all of the complainants, and indeed all of the employees, had a full and fair opportunity to ask questions respecting the proposed collective agreement and to make such statements as they wished prior to the ratification vote.

14. The ratification vote for the revised memorandum of settlement was conducted on Wednesday September 9, 1981. Because the employer apparently would not allow its premises to be used for the taking of the vote the union, in an effort to make the vote accessible to as many employees as possible, conducted the vote from a rented van which was parked across the street from the company's premises. In a secret ballot vote each employee was asked to respond to the question "Do you accept the company's final offer?". Voting was conducted in the van from 6:30 a.m. to 9:30 a.m. and from 2:00 p.m. to 7:00 p.m. and had been previously posted to the attention of the employees by a formal written notice of the union. Out of an abundance of caution and fairness to the complainants the union allowed the complainants to maintain a scrutineer in the van during the entire period of the polling. In the result 20 ballots were cast in favor of accepting the proposed collective agreement and 19 ballots were cast against. The complainant maintains that the ratification and the collective agreement resulting from it were obtained by unlawful intimidation and coercion on the part of the trade union.

15. The evidence in support of that allegation is so slim as to be almost imperceptible. Counsel for the complainants suggests that by requesting him to leave a meeting of the bargaining unit to which he had not been invited the union intimidated and coerced the employees. He further submits that prior to the final ratification vote, in a letter dated September 4, 1981 advising the employees of the terms of the new settlement the union unlawfully intimidated the employees by stating that should the settlement be rejected the union would set up picket lines and take economic action against the company at midnight September 9, 1981. He also submits that the form of the ballot, referring as it did to the "final offer" of the company was misleading and designed to intimidate and coerce the employees.

16. We do not see any violations of the Act made out against the respondents on the evidence before us. The Board accepts the evidence of Mr. Dayman that he believed the position put forward by the employer which became the subject of the last ratification vote

represented the last concessions which the company was prepared to make. As the chief architect of the union's bargaining strategy he could not be expected to bargain indefinitely with the company over the terms of a collective agreement. He cannot, moreover, be faulted for ordering the union's affairs in such a way as to avoid being vulnerable to a termination application or an application for displacement by another union. To that extent we see nothing sinister or unlawful in the timing of the ratification votes and strike votes in this case. Article 23 of the union's constitution makes specific provision for the ratification vote to be taken on "the proposal judged by the president or negotiation committee to be the employer's final proposal . . ." The evidence does not disclose that Mr. Dayman or any other union officer departed from the requirements of the Act or of the regular provisions and procedures of the union's constitution in the conduct of the strike and ratification votes.

17. The Board is not prepared in this case to second guess the motive of employees for their choice expressed in a secret ballot vote. It is plain from the evidence that there were three general groupings of employees: those in support of the union, those opposed to the union and those who were uncommitted. How each employee voted and the motive for his or her choice is personal to that individual; valid inferences in that regard cannot be drawn from the evidence. Some may have accepted the contract because of the additional benefits bargained in since the strike vote was taken; others may have voted for the contract to avoid striking. Most employees probably had a mix of motives. To conclude that the Act has been violated because a certain number of employees voted in favor of ratification to avoid going on strike is to misconceive the normal workings of the Act. That is a choice that organized employees must make continuously in this Province as part of the normal process of collective bargaining. It is the very choice that the *Labour Relations Act* ultimately forces upon them to promote compromise and the peaceful resolution of bargaining disputes; that is the avenue employees choose when they opt for union representation. On the evidence before us we see nothing that unlawfully deprived the employees of their freedom of choice.

18. The complainants also called extensive evidence in respect of the defacement of a Board notice. It appears that when Form 15, the Notice to Employees of the Application for a Declaration Terminating Bargaining Rights was posted in the plant in late September and early October of 1981 someone placed the imprint of a boot in black ink upon it. While the Board must have obvious concern for the defacement of its notices it cannot, on the purely circumstantial and speculative evidence before it, draw any conclusions on the balance of probabilities as to what individual or group of persons was responsible for that act. We cannot find that it was committed by any individual union officer or employee who is a respondent in these proceedings or that it was done on the instruction or approval of the respondent union.

19. For the foregoing reasons the complaint under section 89 is dismissed. The application for the termination of the union's bargaining rights is also dismissed as being untimely.

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**1536-81-M** Labourers' International Union of North America, Local 183, Applicant, v. **Butera Const. Ltd.**, Respondent.

**Construction Industry Grievance – Remedies – Employer claiming grievor paid at wrong higher rate through mistake – Deducting amount of overpayment of termination – Making further deduction for “lost items” – Whether grievor employed as labourer or cement finisher – Board applying provision of *Employment Standards Act* re deductions from wages – Interest at prime rate awarded from due date on full amount owing**

**BEFORE:** E. N. Davis, Vice-Chairman, and Board Members H. J. F. Ade and W. F. Rutherford.

**APPEARANCES:** *L. Richmond and T. Lucas for the applicant; B. Butera, N. Butera, S. Salyon and A. DaGostino for the respondent.*

**DECISION OF THE BOARD;** April 16, 1982

1. This is a referral of a contract grievance to arbitration under section 124 of the *Labour Relations Act*.
2. The grievor, Giovanni Napoleoni, was employed during the summer of 1981, by the respondent who is bound by a collective agreement with the complainant. At the time of Napoleoni leaving the employ of the respondent during the latter part of August 1981, he had deducted from his final wage payments, an amount of \$28.00 “for lost items” and an amount of \$397.83 “for wrong rate paid”. It is the respondent’s position that the \$397.83 arose as a result of Napoleoni having been mistakenly paid, throughout his employment, a rate of \$10.69 per hour which is the applicable rate for a “cement finisher” instead of a rate of \$10.24 which applies to the classification of “labourer” in which it is alleged Napoleoni worked.
3. Antonio Antoniani was hired by Mr. N. Butera, President of Butera Const. Inc. in April 1981, as Foreman. During the hiring interview, Butera indicated he needed additional workers including another cement finisher and two form setters, and Butera instructed Antoniani that if he knew some good workers to bring them in. According to Antoniani, there was discussion of potential employees he had in mind. In the discussion regarding Napoleoni, they examined the alternative of his being used either to put forms in or to do cement finishing with Butera finally stating that Napoleoni should be used for cement finishing. According to Antoniani, he then talked with Napoleoni and told him to come to work as a cement finisher; he did not discuss actual rate of pay but told him he would be paid as a cement finisher. Antoniani, as foreman, was responsible for some 17 or 18 employees, of whom 6 or 7 were cement finishers. Napoleoni, who was hired April 27, 1981, was paid throughout his employment at the cement finisher’s rate.
4. Butera testified that some two weeks before Napoleoni’s last day of work, there was a dispute resulting in Butera telling Napoleoni he was fired. At that time, Butera had the U.I.C. separation slip made up for him and it was from observing the classification as “cement finisher” on this document that Butera states he first became aware that Napoleoni was wrongly classified. As it turned out, a day later, Napoleoni returned to the job as Butera had a shortage of labour. Butera stated he said nothing to Antoniani at this time regarding the matter of classification or rate of pay. Napoleoni continued to work for a further week until



August 25, 1981, and continued to be paid at the cement finisher's rate (in effect received two payments).

5. By letter dated September 4, 1981, addressed to Napoleoni from Butera Construction, he was notified as follows:

"Please note that due to a mix up in our office you have been receiving the wrong hourly rate. You have been paid as a Cement Finisher instead of a Labourer. We have made the proper adjustment on your last pay cheque.

There has also been \$28.00 deducted because of hammers and wheel Barrel [sic] missing."

6. It appears that on the same day that Napoleoni left Butera's employ, Antoniani and two others also left and returned to the employer they had worked for prior to working for Butera.

7. Considerable testimony was heard with respect to the actual work performed by Napoleoni while in Butera's employ. Antoniani, under whose supervision Napoleoni worked for 80-90% of his time, testified that he had worked in the construction of roads, curbs and sidewalks for 23 years and that the Butera mode of operation was no different than others. He gave detailed evidence as to the duties of cement finishers at Butera Const. Ltd. and produced before us a number of tools regularly used by such finishers. He stated no labourer used these tools and that the job required training and skill not possessed by labourers, and requires concentrated attention to detail in that once the cement hardens no corrections can be made. He testified that Napoleoni worked as a cement finisher and was assigned to the same work as other cement finishers under Antoniani's supervision, and performed with equal competence. In Antoniani's judgment, Napoleoni had all the experience and skills required to do the job. He also stated that Napoleoni did as much cement finishing as other finishers, and that when finishers were not working on cement, they would be putting in the forms and always were paid the finisher's rate.

8. Giovanni Colabro was also employed by Butera as a cement finisher over the same period of time as Napoleoni. He had worked as a finisher for 15 years and corroborated Antoniani's evidence relating to the job requirements of a cement finisher. He stated he had worked along with Napoleoni although he couldn't remember how often but estimated 50% of the time, and that on those occasions Napoleoni was doing similar work for Colabro and it was cement finisher work. He stated Napoleoni was a good cement finisher. He also stated that irrespective of what work assignments he was given he continued to be paid as a cement finisher.

9. Napoleoni testified that he had worked as a cement finisher for six years prior to entering Butera's employ, and that in some of his previous employment he had also worked for 2-3 years under Antoniani's supervision. He stated that he was hired as a cement finisher and throughout his employment worked as such. He stated that during that period he was working on cement sidewalks and curbs for three out of four months and that during the remaining month he worked on a retaining wall project. His description of the work done by him on sidewalks and curbs fell squarely within the descriptions of work given by other witnesses as performed by cement finishers and he established that he had worked with tools which are

peculiar to the cement finishers' occupation. He stated that he was responsible for the quality of his work and that at no time had this been the subject of a complaint from either Butera or Antoniani. He stated he worked as a cement finisher every day with hours varying from six hours to nine hours and that other cement finishers on the job did nothing different from what he did. He stated he did cement finishing work on the retaining wall, putting forms on and cement in.

10. Nicola Butera, who was called by the Company, testified that during the period Napoleoni was employed, that he, Butera, had worked as a labourer on a different crew than Napoleoni. He testified that over the period he had worked at the same site as Napoleoni and when asked in cross-examination what he had seen Napoleoni doing, his response was "don't remember — but he'd be there", and that he never saw him work on cement. When asked if he had ever seen other cement finishers not doing cement work, his response was "the odd time when we were not pouring cement".

11. Alberino DaGostino who has been employed by Butera for four years as a labourer stated that he had worked during July and August 1981 under Antoniani's supervision for a day or two or three at a time. He stated that in one month he worked with Napoleoni but was unable to remember for how many days, but that during that time, Napoleoni was doing the same thing as DaGostino. DaGostino stated that Napoleoni had told him on the job when they were working together that he had been hired as a labourer and also that he did not know how to do cement finishing.

12. Mr. Butera, President of the respondent, testified that he had instructed Antoniani to hire Napoleoni as a labourer. Also that he had supplied the information as to "payroll qualification" to his wife who is responsible for bookkeeping. He states that he had told her Napoleoni would be a labourer but thinks she got mixed up between Giovanni Napoleoni and Giovanni Colabro and paid them both as cement finishers. We did not hear any testimony from Mrs. Butera. Butera stated that he signed all payroll cheques and that at the time of signing a payroll employee stub is attached to the cheque. In one such stub with respect to his final period of work made out to Napoleoni, hours are indicated as "21" and this is followed by "x 10.69". Butera conceded he could have checked Napoleoni's rate at the time of signing cheques but "I can't check everytime for every employee", and that the matter first came to his attention as we have previously discussed. Butera testified that he had verbally told Napoleoni of the change in rate when he returned to work. When asked whether he continued to be paid at the old rate after returning, Butera's response was "I don't know what he was paid". Butera also stated that while he did not tell Antoniani of the change in rate, he had told payroll.

13. Butera testified that he generally was on the job site once or twice a day and had observed Napoleoni spreading cement with a rake which is a labourer's job and had seen him do other labour work.

14. Sam Salbo was a truck driver during the summer of 1981. Salbo drove a dump-truck but stated that on some days he was at the job site all day and this would be more than one-half his time, and that on about 55% of those days, he worked with Napoleoni. When asked if Napoleoni was a cement finisher his response was "I don't know exactly — I never see him work steady with cement". When asked if Napoleoni did labour work, the response was affirmative and when followed by the question "when the cement was being finished" the response was "if he was not needed to help on the cement, he would do labour work". He stated

that when cement finishers were not working as such, they did other work and he had never seen anyone work on cement all the time.

15. On all of the evidence before us, we are satisfied that Napoleoni was hired as a cement finisher by Butera Const. Ltd. and throughout his employment worked as a cement finisher doing the same work and using the same tools and receiving the same types of work assignments as other employees classified as cement finishers. Napoleoni was therefore entitled to be paid at the rate of wages set forth in paragraph 2, Schedule "A" to the Collective Agreement, i.e. an hourly rate of \$10.80 for each hour worked during the period of his employment (less such amounts per hour authorized by the collective agreement to be deducted therefrom). Having come to that conclusion, the claim of the employer that he had made deductions in order to rectify an administrative error must be viewed as having no foundation.

16. In respect to the deduction from wages made by the employer in respect to alleged lost tools and/or equipment it is not necessary, in view of the applicable law, for us to express an opinion as to the merits of such a claim. Section 8 of the *Employment Standards Act* reads as follows:

"Except as permitted by the regulations, no employer shall claim a set-off against wages, make a claim against wages liquidated or unliquidated damages or retain, cause to be returned to himself, or accept, directly or indirectly, any wages payable to an employee."

Regulation 803/75, section 14, made under that Act sets forth the specific circumstances under which a set off against or deduction from wages may be made. The employer here has failed to establish that the deduction of \$28.00 falls within any of those enumerated circumstances and the deduction made must be viewed as having been made contrary to the *Employment Standards Act*.

17. The remedy sought on behalf of the grievor is an amount of \$397.83 representing the difference between what he received and the amount he should have received, had he been paid the rate of cement finisher throughout his employment; in addition, the amount of \$28.00 improperly withheld is claimed; and interest at the prime rate calculated on the total amount from the date in September 1981, when wages should have been paid in full until such payment is made. Counsel for the Union argued that an award including interest is now becoming an accepted practice in arbitral remedies and refers us to decisions in the cases of *C.F.B. Borden Board of Education and Federation of Women Teachers' Association* (unreported, Katherine Swinton, Chairman, Feb. 3, 1981; *Air Canada and Canada Air Line Employees' Association* (1981), 29 LAC (2d) 142 (Pamela C. Picher); and *Elgin Ford Sales Limited and United Steelworkers of America, Local 8300* (unreported, Ross L. Kennedy, Chairman, July 3, 1981). Counsel further argued that the formula adopted by the Ontario Labour Relations Board in *Hallowell House Ltd.* [1980] OLRB Rep. Jan. 55 and leading to the Board's practice note #13, September 8, 1980, was not adequate in the instant case. He pointed out that such formula was in contemplation of the total damages accruing in increments over a period of time, and not as here, where from the outset the damages sought had fully accrued at the time the deduction was made.

18. The rationale for including interest in arbitration awards, in our view, has been well and persuasively reviewed in the awards to which counsel has referred us, and we adopt that reasoning. We think there is merit in following the formula for calculation set out in the



Ontario Labour Relations Board Practice Note #13 but, agree with counsel for the Union that in implementing the formula in a case such as the present, the realities require some interpretative improvisation.

19. We therefore order and direct Butera Construction Inc. to pay to Giovanni Napoleoni the sum of \$425.83 together with interest thereon at a rate equal to the prime rate published by the Bank of Canada in the Bank of Canada review for the month of September 1981 (being the month the full amount became due and payable) for the period commencing on the day wages in full should have been paid up to the day when such total amount is paid to Napoleoni. In the event that the parties are unable to agree as to how this award should be implemented, we shall remain seized of the matter.

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**2381-81-R International Union of Allied Novelty and Production Workers, Local 950, Applicant, v. Central Hospital, Respondent.**

**Certification – Trade Union – Trade Union Status – Union seeking bargaining rights for office unit in health care sector – Whether union having jurisdiction to take employees in health care sector into union membership – Second application not abuse of Board's process**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and S. Cooke.

**APPEARANCES:** *Bryan D. Hackett and Fernando Da Silva for the applicant; Brian O'Byrne, Sandra Aiken and George Johnson for the respondent.*

**DECISION OF THE BOARD; April 20, 1982**

1. By decision dated March 8, 1982, in this application for certification, another panel of the Board, chaired by the present Vice-Chairman, directed that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

“All office and clerical employees of the respondent at its hospital in Metropolitan Toronto save and except Supervisors, persons above the rank of Supervisor, Administrative Assistants to the Executive Director, the Administrator, the Assistant Administrators and the Personnel Director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods.”

The Board also directed that the ballot box containing all of the ballots cast in the pre-hearing representation vote be sealed and that the ballots not be counted pending further direction by the Board.

2. As noted in paragraph 3 of that decision (which is, as yet, unreported), the respondent has filed with the Board a Form 10 Reply to this application in which it states:

“The respondent submits that the applicant is a trade union without status to represent employees in an office and clerical bargaining unit in a hospital in the health care field in Ontario and the application should therefore be dismissed. It is noted that the instant application was filed with the Board on February 17, 1982. The respondent wishes to point out that it was informed by the Board on February 18, 1982 that the applicant had withdrawn its Application for Certification previously filed in respect of employees of the respondent affected by this application (Board file number 2283-81-R). The respondent submits, in the circumstance, that the instant application constitutes an abuse of the Board’s process under the governing legislation and should, accordingly, not be entertained. The respondent further submits that having regard to the foregoing considerations a pre-hearing representation vote ought not to be directed and the respondent requests that a hearing of the Board be held to deal with the issues raised above and such other representations as may be made on its behalf.”

3. After the pre-hearing representation vote had been taken on March 15, 1982, a hearing was scheduled for the purpose of hearing evidence and representations of the parties.

4. In support of his contention that the applicant is without status to represent employees in an office and clerical bargaining unit in a hospital in the health care field in Ontario, counsel for the respondent referred the Board to Article II of the Constitution of the International Union of Allied, Novelty and Production Workers (the “International”) which provides:

#### “Jurisdiction

The jurisdiction of the International Union shall cover workers employed in the manufacture of dolls, playthings, toys, novelties, plastics and related industries, and workers in such other trades and industries as the General Executive Board may determine.”

The composition of the General Executive Board is described in Article 6, Section 1 which provides, in part, as follows:

“The officers of the International Union shall be President, Executive Vice President, Secretary-Treasurer, First Vice-President, Second Vice President, Third Vice President, Fourth Vice President and Fifth Vice President. The General Executive Board shall be composed of the foregoing International officers, three Trustees, and seven additional Executive Board Members, all of whom shall be General Executive Board Members and all of whom shall be elected as provided herein. . . .”

Section 9(c) of Article VI provides:

“Two-thirds of all members of the General Executive Board shall constitute a quorum for the transaction of business at any meeting and all decisions of the Board shall be by majority vote of those attending.”

Counsel for the respondent also referred the Board to the following sections of Article X:

“Membership

Sec. 1. Except as hereinafter provided, any worker who is employed in a trade or industry within the jurisdiction of the International Union shall be eligible to apply for membership. No foreman or forewoman or any other person acting on behalf of an employer and having the power to hire or fire shall be eligible for membership.

Sec. 2. No person who has been an employer, a foreman, a forewoman or who acting on behalf of an employer has had the right to hire or fire, shall be eligible for any office in the International Union or local union or joint board for a period of five years following the date he last held such position.

Sec. 3. No person who is a member of any other labor organization claiming bargaining rights within any plant within the jurisdiction of the International Union shall be admitted to or retain membership. If such person is a member, he or she may be summarily suspended pending the filing of charges and a hearing as provided in Article XIII.”

The Constitution also provides for each local union, such as the present applicant, to “adopt by-laws for its government”, but provides that such by-laws “shall not be inconsistent with this Constitution” and further provides that in the event of a conflict between the by-laws of a local union and the Constitution, the Constitution shall control (Article VIII, Section 4). No such by-laws were filed with the Board in the present case.

5. Counsel for the respondent filed with the Board a copy of a computer print-out listing the twelve collective agreements which the applicant trade union has filed with the Minister of Labour as required by section 83 of the Act. It was common ground between the parties that office and clerical employees are excluded from each of those collective agreements, all of which are with “private sector” employers. However, counsel for the applicant stated that those collective agreements cover relatively small operations where the number of clerical workers would probably be insufficient to make organization for collective bargaining purposes practicable.

6. There was also filed with the Board in support of this application the following telegram:

“We, the International Union of Allied Novelty and Production Workers, AFL-CIO are sending this telegram on behalf of our affiliated Local 905, 131 Bloor St West, Toronto Ontario in connection with its application for certification of clerical workers working for Central Hospital, File No. 2381-81-R.

You are advised that this International Union and all of its affiliated Locals Unions and joint boards are authorized by the International



Constitution and the Constitutions of all of our Local Unions and joint boards to organize +all workers employed in the industry under its jurisdiction+, which includes, both in practice and policy of this International Union and all such Local Unions and joint boards affiliated with it, all clerical workers as well as all other workers.

Article III of our Constitution provides as follows: +The Objects of the International Union are A) To unite within the International Union all workers employed in the industry under its jurisdiction+.

This includes all workers including clerical workers. In addition the International Executive Board has consistently and as a matter of policy authorized the International Union and all its affiliated Locals and joint boards, including Local 905 of Ontario to organize such clerical workers.

In addition many of our Local Unions have, over the years and to the present date, organized and have organized clerical workers in our various shops who are members of our Local Unions and joint boards as well as the International Union.

In addition the provisions of Article IIIA, quoted above providing for the organization of +all workers employed in the industry under its jurisdiction+ has no limitation on the jurisdiction by the shop being organized.

All Locals in the International Union and the International Union itself have +jurisdiction+ to organize all unorganized employees regardless of the type of work or type of plant or services involved. Respectively submitted,

International Union of Allied Novelty and Production Workers AFL-CIO by Julius Isaacson 2128891212 147 East 26 St New York NY 10010”

(The Board was not advised what position Mr. Isaacson holds with the International.)

7. The Board has consistently refused to certify an applicant trade union whose constitution makes ineligible for membership some or all of the employees whom it would be required to represent if it were certified as their bargaining agent, unless the trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its constitution. (See, for example, *Gaymer & Oultram* (1954), 54 CLLC ¶ 17,073; *Playtex Limited*, [1959] OLRB Rep. Dec. 316; *Canadian Cannery Limited*, [1965] OLRB Rep. May 126; *The National Cash Register Company of Canada Limited*, [1969] OLRB Rep. June 375; *Campbell Reproductions Limited*, [1971] OLRB Rep. Feb. 134; *400 University Avenue Prospect Company*, [1972] OLRB Rep. Jan. 110; *The Evening Tribune*, [1973] OLRB Rep. June 361; *The Etobicoke General Hospital*, [1975] OLRB Rep. July 551; and *Windsor Raceway Holdings*, [1979] OLRB Rep. Feb. 154.) The rationale for that approach, as explained in *Gaymer & Oultram*, *supra*, is that if the trade union negotiated a collective agreement which made membership in it a condition of employment (as permitted in certain circumstances by section 46 of the Act), such constitutional membership restrictions could result in the discharge of employees whom the trade union is required to represent.

8. Prior to the decision in the Supreme Court of Canada in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al*, 70 CLC ¶ 14,008; 11 D.L.R. (3d) 336, the Board had developed a long-standing practice of accepting as valid evidence of membership in a trade union, a written application for membership and proof that the person applying for membership had paid at least \$1.00 in respect of initiation fees or monthly dues of the trade union, or had done some other act consistent with membership in the trade union. In applying that policy the Board did not consider the constitution of the applicant trade union except in extraordinary circumstances, such as where the constitution excluded from membership a class of persons included in the bargaining unit for which the trade union sought bargaining rights. As noted in *Windsor Raceway Holdings Limited, supra*, at paragraph 6, that flexible approach “was adopted out of regard for the principle set out in section 3 of the Act to the effect that everyone is free to join a trade union of his choice, and because the Board took cognizance of the fact that many union constitutions had been drawn up by laymen and of the further fact that unions had often developed practices with respect to membership requirements which did not always comply strictly with the constitution.”

9. In *Metropolitan Life Insurance Company, supra*, the Supreme Court of Canada held that the Board, in considering whether the trade union that was applying for certification in that case had met the Board’s standard of membership, failed to deal with the question remitted to it, namely, what percentage of the employees in the bargaining unit at the time the application was made were, at the relevant time, members of that trade union within the meaning of section 7 of the Act. That case resulted in the enactment of what are now sections 1(1)(I) and 103(4), which provide:

“1.-(1) In this Act,

- (I) ‘member’, when used with reference to a trade union, includes a person who,
  - (i) has applied for membership in the trade union, and
  - (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and ‘membership’ has a corresponding meaning;

- 103(4) Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for such eligibility requirements.”

Those provisions in effect codified the Board’s prior practices. In *Zeller’s Limited*, [1970] OLRB Rep. Nov. 809, the Board wrote:

“The evidence of membership filed by the applicant in this case satisfied the requirements of section 1(1)(ga) [now section 1(1)(I)] of the Act.

Where, as in this case, persons are claimed by the applicant as members and the evidence of membership satisfies the requirements of the Act, the Board assumes that the union has not violated its own charter, constitution or by-laws and therefore the Board assumes that the union has the right to accept and has accepted such persons into membership under the provisions of its charter, constitution or by-laws. Of course, this assumption is rebuttable. If there is a challenge to the applicant's jurisdiction to take such persons into membership and such challenge is supported by evidence that casts serious doubt on the applicant's right under its charter, constitution or by-laws to take such persons into membership, the Board, pursuant to the provisions of section 77(4) [now section 103(4)] of the Act, will require the union to prove that it has an established practice of admitting persons into membership without regard to the eligibility requirements of its charter, constitution or by-laws."

That passage, which summarizes the approach that has been consistently applied by the Board in cases of this type, was quoted with approval in *Windsor Raceway Holdings Limited*, (*supra*), and *Forintek Canada Corp.*, [1979] OLRB Rep. June 509.

10. In the instant case, the evidence of membership filed by the applicant satisfies the requirements of section 1(1)(1) of the Act. However, the respondent has challenged the applicant's jurisdiction to take into membership the employees in the bargaining unit for which the applicant seeks bargaining rights. In support of that challenge, the respondent has drawn the Board's attention to Article II; Article VIII, Section 4; and Article X, Sections 1, 2 and 3 of the Constitution. By virtue of Section 1 of Article X, only workers employed in a trade or industry within "the jurisdiction of the International" are eligible to apply for membership. Although the by-laws of the applicant, which is a local of the International, were not filed with the Board, any such by-laws are required by Section 4 of Article VIII of the Constitution to "not be inconsistent" with the Constitution. Moreover, as noted above, that Section provides that the Constitution "shall control" in the event of a conflict between the by-laws of a local union and the Constitution. Therefore, the Board is satisfied that the by-laws of the applicant cannot make any persons eligible for membership in the applicant who would not be eligible for membership in the International under its Constitution. Article II of that document provides that the "jurisdiction of the International Union shall cover workers employed in the manufacture of dolls, playthings, toys, novelties, plastics and related industries, and workers in such other trades and industries as the General Executive Board may determine." The applicant's position is not strengthened by the fact that the Constitution does not expressly exclude "office and clerical employees" since it is obvious that the office and clerical employees of the respondent hospital are not "workers employed in the manufacture of dolls, playthings, toys, novelties, plastics" or in any related industry. Thus, such employees could only be eligible for membership pursuant to the Constitution if office and clerical workers employed by a hospital are workers in a "trade" and "industry" which has been "determined" by the General Executive Board to be within the jurisdiction of the International.

11. Counsel for the applicant contended that the telegram quoted above establishes that the General Executive Board has determined that the employees for whom the applicant seeks bargaining rights in this case are within the "jurisdiction" of the applicant. Although the Board has a discretion to admit as evidence a document such as that telegram (by virtue of



section 103(2)(c) of the *Labour Relations Act*, and section 15 of the *Statutory Powers Procedure Act*), the Board is not prepared to give any weight to that telegram in the circumstances of this case. There is no evidence before the Board concerning the position held by the person who purportedly sent the telegram to the Board, nor concerning the basis of his knowledge of the information contained in it. Section 9(c) of Article VI of the Constitution requires that all decisions of the General Executive Board shall be by majority vote of those in attendance at a meeting of the General Executive Board. To be satisfied that the General Executive Board has, as suggested by the telegram, determined that all clerical workers are within the jurisdiction of the International, the Board would require at least a certified copy of a motion or resolution to that effect passed by a majority vote of those in attendance at a meeting of the General Executive Board, if not *viva voce* evidence from someone who was in attendance at such meeting. (See, for example, *Forintek Canada Corp.*, *supra*, in which the Board accepted and relied upon a certified copy of a motion passed at a meeting of the National Board of Directors of the Public Service Alliance of Canada, by which that body "determined" that Federal Government employees at certain laboratories which were about to be "privatized", would continue to be "public service employees" eligible for membership in the Alliance after the operations had been "privatized" as a non-profit foundation.)

12. After counsel for the respondent had completed his reply argument, counsel for the applicant requested that the Board adjourn these proceedings to permit the applicant to obtain and file in support of its position a certified copy of a General Executive Board motion. That request was denied by the Board in an oral ruling which is hereby confirmed. Although we are not without sympathy for counsel for the applicant, who advised us that he was retained only a short time before the hearing, the applicant itself had notice well in advance of the hearing that its "status to represent employees in an office and clerical bargaining unit in a hospital in the health care field in Ontario" was being challenged by the respondent. That issue was clearly raised in the respondent's Reply, a copy of which was forwarded to the applicant by the Registrar on February 24, 1982. Moreover, the Board's decision dated March 8, 1982, in which a pre-hearing representation vote was directed to be taken in this matter, clearly indicated that a hearing would be held after the taking of the vote, for the purpose of resolving that issue and the other issue (abuse of process) raised by the respondent in its Reply. Thus, the applicant had ample time to retain and instruct counsel sufficiently in advance of the hearing to provide him with a reasonable opportunity to prepare the applicant's case. If the Board were to grant adjournments for the purpose of enabling parties to obtain additional evidence in support of their positions, in circumstances where such parties had failed to proceed with due diligence to marshal prior to the hearing the evidence necessary to support their case, there would be a substantial risk that many of the Board's proceedings would become unduly protracted to the detriment of all parties who appear before us, and to the particular detriment of applicants in certification proceedings where, as has long been recognized by the Board and the Courts, "labour relations delayed are labour relations defeated and denied" (see *General Bearing Services Ltd.*, [1980] OLRB Rep. Aug. 1200, and the numerous authorities cited therein.) Thus, in view of the great importance of expedition to the efficacious administration of the certification procedures under the *Labour Relations Act*, it is particularly important in certification matters that all parties be prepared to prove their case on the date fixed for hearing.

13. For the foregoing reasons, the Board finds that the material before us in this case casts serious doubt on the applicant's right, under the Constitution of the International and the by-laws of the applicant, to take into membership the employees of the respondent in the

bargaining unit for which the applicant seeks a certificate. Moreover, the applicant's case is not assisted by section 103(4) since the Board is not satisfied that the applicant "has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws". Even if the Board were prepared to give weight to the aforementioned telegram, which we are not, the telegram merely indicates that "many of [the International's] local unions" have organized, in various shops, clerical workers who are members of those local unions and the International; neither the telegram nor any other evidence before the Board indicates that Local 950, the applicant in the present case, has itself ever admitted office and clerical employees as members. Thus, section 103(4) does not assist the applicant since it has not satisfied the Board that it has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws.

14. The respondent also contended that this application constituted an abuse of the Board's process and should, accordingly, not be entertained. As noted in the respondent's Reply, this application was filed on February 17, 1982 at a time when a final decision had not yet been issued by the Board with respect to a previous certification application filed by the applicant (Board File No. 2283-81-R). However, by decision dated February 18, 1982, another panel of the Board issued the following final decision with respect to that application:

"Application withdrawn by leave of the Board"

Counsel for the respondent contended that the first application "must have been a form of fishing expedition" to see how many employees were in the bargaining unit or what kind of bargaining unit description the employer would propose. Counsel for the applicant advised the Board that the applicant filed 15 membership cards in support of its initial certification application and did not request a pre-hearing vote because it was thought that there were only about 20 employees in the bargaining unit. However, when the applicant discovered after filing the initial application that it was the respondent's position that there were 33 employees in the unit, the applicant sought leave of the Board to withdraw the initial application on February 17, 1982 and immediately filed a fresh application in which it requested a pre-hearing representation vote. Counsel for the applicant noted that it is often difficult for a trade union to determine with any degree of precision the number of employees in an office and clerical bargaining unit for an institution such as the respondent where the respondent "does not open its employment records" to the applicant.

15. Having regard to all of the circumstances, the Board finds that the filing of this application did not constitute an abuse of the Board's process. Accordingly, we are of the view that it was appropriate for the Board to postpone consideration of the present application until the final decision had been issued concerning the original application, and thereafter to consider the present application (pursuant to section 103(b) of the Act), rather than to refuse to entertain the subsequent application (pursuant to section 103(c) of the Act) as requested by the respondent.

16. For the reasons set forth earlier in this decision, this application is hereby dismissed.

17. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**0607-81-R** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, Applicant, v. **The Charming Hostess Inc.**, Amsterdam Catering Services Limited, and Molson's Brewery (Ontario) Limited, Respondents

**Related Employer – Sale of a Business – Molsons replacing old hospitality room with new expanded facility – Contracting out food services and supply of hostesses – No coherent and severable part of going concern transferred – Sub-contracts not amounting to sales of part of a business – Sub-contractors independent businesses – Not related employers vis-a-vis Molsons**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

**APPEARANCES:** *J. McNamee, for the applicant; J.P. Sanderson, Q.C. and J. Forbes-Roberts for The Charming Hostess Inc.; P. Graham and W.J. Whittaker, Q.C. for Amsterdam Catering Services Limited; J.W. Healy, Q.C., M.J. Addario and R.I. Busch for Molson's Brewery (Ontario) Limited.*

**DECISION OF THE BOARD:** April 1, 1982

I

1. This is an application under sections 63 and 1(4) of the *Labour Relations Act*, involving the subcontracting relationships between Molson's Brewery (Ontario) Limited, The Charming Hostess Inc., and Amsterdam Catering Services Limited. For ease of reference, the parties will be referred to as: "the union", "Molson's", "Charming" and "Amsterdam". The union contends that Molson's has transferred "part" of its "business" to Charming and Amsterdam or alternatively that the subcontracting arrangements are such that all three respondents should be considered one employer for the purposes of the Act.

• • •

3. The respondent Molson's operates a brewery at 641 Fleet Street in the City of Toronto. From approximately 1955 until October 1980, the Toronto brewery had a "hospitality room" on its premises known as the "Anchor Room". In October 1980, the respondent closed the Anchor Room, and the four members of the union employed therein were transferred to jobs at the same rate of pay in the packaging department of the brewery. These four individuals remain employees of Molson's within the bargaining unit represented by the applicant union. The Anchor Room itself was totally demolished and the space is now used for Molson's centralized marketing offices.

4. Contemporaneous with the conversion to office use of the space formerly occupied by the Anchor Room, the respondent engaged a number of construction contractors to build a new hospitality suite on the roof of the brewery. This new facility known as the "John Molson Room", opened in June 1981. Charming supplies hosts and hostesses for the functions held in the John Molson Room. Amsterdam supplies the required food services. In view of the argument made by the union, it will be necessary to consider the functions of the old and new hospitality facilities in some detail.

5. The Anchor Room occupied approximately 4800 square feet and had room for 80 to



100 people. It was used primarily as a reception area for casual tours by outside groups visiting the plant, and by Molson's own employees at lunch time, and after work. The room was also used on occasion for employer-employee functions, such as safety or retirement dinners.

6. For the most part, food services in the Anchor Room were rudimentary, consisting in the morning, of danish pastries and coffee, and in the afternoon, of pretzels, chips, cheese, pickles and, of course, beer. The food was distributed to the tables by the "bar stewards" who also served the beer. There were four stewards on staggered shifts covering the 12 to 14 hour period during which the Anchor Room was open. The stewards were the only full-time employees working in the room.

7. For evening tours, the fare was more varied and could include open-faced sandwiches, salads, lasagna (precooked but warmed on the premises), or other fairly simple items served buffet style. Full "sit-down" dinners were infrequent, as were any complicated cooking requirements. The food was generally prepared and served by six part-time kitchen staff — although the bar stewards would assist, as required, (for example by carving the meat, or boiling eggs earlier in the day), and would help to clean up after the tour had left. The food was purchased and the menu prepared by a Molson's supervisor. The individual overseeing the operation was Gerry Dymant, the Toronto hospitality supervisor.

8. In addition to the four stewards and six kitchen staff, the Anchor Room employed fourteen part-time tour guides who, along with the stewards, actually conducted the tours. The hostesses were primarily responsible for welcoming the guests, and ensuring that they enjoyed their visit; however, the employees' functions were not mutually exclusive or rigidly compartmentalized. Like the stewards, the tour guides would help out to the extent necessary, and in the evening, when there was only one steward on duty, the tour guides served beer. Similarly, the stewards would assist in welcoming the guests and conducting tours.

9. The trade union has never asserted its bargaining rights with respect to either the kitchen staff or the tour guides. Of the approximately twenty-four individuals working in the Anchor Room, the union has sought to represent only the four bar stewards. It should be noted however, that the collective agreement between Molson's and the union specifically mentions the Anchor Room, and treats it as an ancillary part of Molson's business, — much like the retail store which is also maintained on the premises.

10. By 1977, Molson's had become dissatisfied with the way in which the Anchor Room was operating and the calibre of service provided. Management concluded that the existing facility was not promoting the image of quality which the company sought to maintain, and for a time, they considered closing the Anchor Room altogether. Instead, Molson's decided to substantially upgrade the facilities, and institute a new hospitality program as an adjunct to a more ambitious marketing strategy directed to a more sophisticated clientele. These marketing and organizational considerations ultimately resulted in the demolition of the Anchor Room and the construction of the new hospitality facility now known as the John Molson Room. The same considerations prompted Molson's to engage a professional caterer to provide food services and an outside agency to supply hostesses. Both Amsterdam and Charming have an established reputation in their respective fields.

11. The physical facilities of the John Molson Room are quite different from its predecessor. The new hospitality complex includes: a main room with a capacity for 150 people, two

outside terraces with city and waterfront views, a “taste panel room” (for blind market testing with adjoining training facilities), and a fully equipped kitchen and bar with walk-in cooler (designed for licensee training). The John Molson Room is more than twice the size of the Anchor Room — excluding patio space. A somewhat rudimentary slide projector and visual presentation has been replaced by a more sophisticated video tape recorder and large screen T.V. monitors.

12. The use of the John Molson Room is different from that of the Anchor Room. Casual “drop in” tours are a minor as opposed to a primary use, and after the first few weeks of its operation were cancelled altogether. There is now a much more careful assessment of the sales or marketing value associated with a function, and, because the facilities have been significantly upgraded, the company is able to entertain a much more varied and sophisticated clientele. Typically, the booking of the room now originates internally with an employee in the marketing department who envisages a specific target group and sales objective which can be achieved by entertaining his clients in the company’s own hospitality suite.

13. There is no doubt that, in a general sense, the John Molson Room is functionally similar to its predecessor. It is a hospitality facility used by Molson’s as a marketing and promotional instrument. As before, hostesses give a verbal presentation about the mechanics of the brewing process supported by audio-visual aids, point out historical artifacts on display around the room, conduct the guests to a glassed-in area where they can overlook the production line, and generally welcome visitors and try to ensure that they are comfortable and their needs are met. To admit this functional similarity however, is not to ignore the real differences in the quality and sophistication of the services provided, nor can one ignore that the operation of the John Molson Room is much more closely related to a concerted marketing strategy. The general focus is quite different from that of the Anchor Room and, in Molson’s view, this shift in objectives required the employment of outside agencies.

14. As we have already noted, Amsterdam was chosen to provide the food services to the John Molson Room because it could provide a broad range of catering services tailored specifically to Molson’s needs on any occasion. Amsterdam has been in the catering business since 1974 when its established restaurant business was expanded to accommodate the demands of various corporate patrons which required food services for their meetings and conferences. This early indication of a potential market induced Amsterdam to specialize in catering services for corporate needs. Amsterdam now has more than 150 corporate clients of which 50 use its services at least once a week. Amsterdam has serviced such diverse entities as the Canadian Opera Company and Du Maurier Ltd., and has the franchise to provide all of the food services at the Toronto Harbourfront Recreation Complex. It has long term contractual relationships at Harbourfront, Molson’s, the Canadian Broadcasting Corporation, the Canadian Red Cross, and the Canadian Bar Association. These other long term contractual relationships are not unlike the one with Molson’s. Molson’s accounts for about 5% of Amsterdam’s total sales and about 10% of its catering business.

15. Amsterdam currently employs more than 100 full-time employees in the various aspects of its business as well as between 30 to 50 part-time employees, some of whom are “on-call” and used as needed. Most of the full-time employees work either in Amsterdam’s own restaurant, or in the several restaurants and cafeterias at Harbourfront. In the summer, Amsterdam hires an additional 50 full-time employees to satisfy the expanded needs of the Harbourfront operation. The catering aspect of Amsterdam’s business employs 15 people on a

full-time basis, and about 50 part-time employees — although there is some interchange among employees in various parts of its operation who are shifted around in accordance with customer requirements.

16. Because of the size and flexibility of its organization, Amsterdam can now meet just about any customer need — from a sit-down or buffet dinner for 150 (or more) patrons, to an intimate multi-course gourmet meal for a customer's special clients. Some insight into the Amsterdam operation can be gleaned from the range of specialists it employs.

17. Amsterdam has on its staff qualified chefs, sous-chefs, and cooks, as well as a baker, a "chef de legumes", a saucier (whose specialty is preparing sauces, condiments and garnishes to accent meat or fish dishes), and a "garde-manger" (whose expertise is in food arrangement and decoration, to improve its visual impact or "eye appeal"). Amsterdam's two senior chefs were trained in Europe and have more than 30 years experience, having worked at such Toronto establishments as the Inn on the Park, the Four Season's Hotel, and Fenton's. As Paul Graham, the owner of Amsterdam, put it, the chef's organizational, budgeting, and cooking abilities, are the key to a successful restaurant operation. Chefs of this calibre are not trained, he said, they are "stolen" (i.e. hired away) from competitors. Graham maintains that he has two of the best chefs in the City of Toronto, and their salaries, of course, are commensurate with their experience. The chef not only supervises the cooking (and sometimes cooks himself) but is also responsible for quality control, costing, food management, and personnel relations. The chef performs important managerial functions concerning both the delivery of food services, and the organization and direction of the employee team engaged in that activity. Amsterdam did not have to increase its staff to service the Molson's account, nor does it employ any former Molson's employees.

18. Amsterdam has about 60 established menus from which its clients can choose. The items and combinations of items vary in quality, and price. Molson's makes its choice and indicates the number of people to be served. Amsterdam does the rest. Molson's is not involved in the buying, preparation or serving of the food; moreover, Molson's derives a considerable benefit from Amsterdam's efficiency and "bulk-buying" as well as from Amsterdam's ability to reduce surplus and spoilage by using the food in other parts of its operation. Amsterdam has its own kitchens, specialized food preparation devices, refrigeration equipment and storage facilities, which give it much more flexibility than Molson's would have if it sought to handle its food services itself. Indeed, there is little doubt that Molson's could not provide the kind of food service which it now purchases from Amsterdam. Amsterdam's flexibility, size, expertise, bulk-buying advantage, and "back-up" facilities are all parts of the package which made it attractive to Molson's. Molson's considered other caterers, but it never considered supplying its own food services in the John Molson Room. It was recognized that it would not be able to do so economically.

19. The number of Amsterdam's employees working at Molson's at any particular time depends upon the nature of the function scheduled, the number of persons involved, and the complexity of the catering requirements. On average, Amsterdam employees are at Molson's two or three times a week; but this, of course, varies with Molson's needs. Paul Graham suggested that a function involving 150 guests would take place, on average, once or twice a week. To serve a function of this size, Amsterdam would have 12 to 14 employees on the site, including: a supervising chef, or sous-chef, one or more cooks, kitchen help, waiters and waitresses. Like the chefs, all of these individuals were hired by Amsterdam because of their



restaurant experience and can be shifted to other parts of Amsterdam operation, or other locations where Amsterdam is engaged. Consequently, the employee group working at Molson's will change from day to day and function to function. None of the Amsterdam employees work full-time for Molson's. One unskilled employee spends about 50% of his time there, to ensure that the kitchen is clean and that necessary supplies have arrived.

20. For the most part, Amsterdam attempts to prepare hot food on the Molson's premises, although buffet meals can sometimes be prepared elsewhere, and if Molson's equipment breaks down or is inadequate, Amsterdam uses its own. The chef directs and controls the employees' activities and determines their numbers, hours, wage rates, schedules, time off, etc. Part-time employees are called in as required. Molson's has no involvement with Amsterdam's employees. Amsterdam employees do not serve beer.

21. The contractual relationship between Amsterdam and Molson's is fairly simple. Amsterdam acquires the exclusive right to provide food services at the John Molson Room (with certain minor exceptions not here relevant) and undertakes full responsibility for the purchase, preparation and serving of food, as well as the employment and supervision of the personnel engaged in those activities. Amsterdam provides periodic reports concerning food inventories used in the John Molson Room and its records are subject to inspection. Molson's provides the kitchen facilities and equipment (including dishes, cutlery, glassware, etc.) used by Amsterdam on site, and pays for the food necessary to fulfill its requirements. Remuneration to Amsterdam is in two parts; a management fee (which Paul Graham told the Board was calculated on the basis of his estimated managerial and overhead costs which in turn are based upon an anticipated volume of business), and a further sum based upon the number of hours worked by cooks, maitre d's, waiters and waitresses, busboys, and dishwashers. However, the hourly labour rate which Molson's is charged is not the same as the wage rates payable to the employees. Molson's has no involvement in the determination of the wages and benefits of Amsterdam's employees. Officials of Amsterdam and Molson's meet about once a week, to ensure that the services are being provided in accordance with the agreement, and to iron out any problems which might arise. To date, there have been no such problems. The Molson's official attending these meetings is either Gerry Dymont, the Toronto hospitality supervisor or Brian Vachon, the assistant manager for sales promotion. The contract is for one year and is terminable on notice.

22. The motivation for the contract with Charming was similar. Molson's concluded it could enhance the image of its products by engaging "professional" hostesses to perform hospitality functions. Charming has been in this line of business since 1971, and has operated in Ontario since about 1976. It also has service offices in San Francisco, Los Angeles, Montreal, Winnipeg, Calgary and Edmonton. Its employees are former or off-duty airline hostesses. Its clients have included such companies as Chrysler, Kodak, and the Canadian National Exhibition; and it has provided hostesses to various industrial and trade shows. Molson's however, is its only long term contract.

23. Charming employs about 25 employees in the Toronto area (seemingly on a part-time or casual basis). No training is necessary because the hostesses all have at least five years experience with an airline. For the Molson's contract, Molson's supplies certain background material, so that the hostesses can give a welcoming address, and will be familiar with the brewing process. Uniforms are Charming's responsibility. The hostesses are used on an "as needed" basis depending upon the size of the function. As in the case of Amsterdam, remunera-

tion to Charming consists of a management fee, together with a payment in respect of the number of hours worked by each hostess. There is an "on-site" supervisor to coordinate the activities of the hostesses if such is required. A Charming representative meets with Molson's every week or two, to review the situation, and discuss any problems which may have arisen. Molson's has no direct control over the employer-employee relationships of Charming, nor does Molson's know the wage rates payable to the Charming employees.

24. Molson's has no financial or ownership interest in either Charming or Amsterdam. In corporate terms they are entirely independent companies. The only relationship is based upon the contracts and business dealings described above. There is no allegation that in entering those contracts, Molson's was motivated by anti-union animus. The applicant union concedes that Molson's was motivated solely by bona fide business considerations. Moreover, it appears that the subcontracts cannot be viewed as a cost saving measure, as might be the case in other subcontracting arrangements. While the evidence is somewhat sketchy, it appears that in order to upgrade the service provided in the John Molson Room Molson's has had to pay more than it did before.

## II

25. Since the union's case is pleaded in the alternative, it will be convenient to deal with each aspect in turn. The relevant provisions of the statute are as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63(1) In this Section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade union sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

26. When a business or part of a business is disposed of, the transferee acquires it subject to the collective bargaining obligations of his predecessor. Section 63 preserves the labour relations status quo. by transforming collective bargaining rights into a form of “vested interest”, which attaches to the business entity, and like a charge on property “runs with the business”. To accomplish this objective the statute gives a special meaning to the term “sale”, envisages the continuation of bargaining rights in a severable “part” of an employer’s operation, abrogates the notion of privity of contract, and virtually eliminates the significance of the separate legal identity of the new employer. Collective agreements are not treated like ordinary contracts, nor are a union’s representation rights co-extensive with commercial ownership. In *Marvel Jewelry Limited* [1975] OLRB Rep. September 733, the Board summarized the effect of section 63 (then section 55) as follows:

“Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business regardless of any change of ownership.”

27. The terms “sale” and “business”, have not been exhaustively defined in the Act, in recognition, we think, of the great variety of commercial relationships to which they might be applied, and the need for a case by case elaboration of the law in light of labour law policy. This responsibility has been accorded exclusively to the Board (see section 63(12), 108, and *R. ex rel Kitchener Food Market Ltd. et al.* (1966), 54 DLR (2d) 219); and in view of the broad language of section 63 and its intended remedial thrust, the Board has always been disposed to give it a liberal interpretation. The Board has not placed much reliance on the legal form which the business disposition happens to take as between the predecessor and successor. On the other hand, not every business decision which prejudicially affects bargaining rights will fall within the ambit of section 63, nor will every commercial disposition be a transfer of “part of a business” resulting in a continuation of bargaining rights. The task faced by the Board in any particular case is to give section 63 an interpretation which is consistent with its language and intent, and is also fair to the labour relations context under review.

28. It is seldom very difficult to determine that a predecessor has disposed of “something”, nor is it difficult to discern when a trade union’s bargaining rights have been prejudicially affected. A more complex question, however, is whether the nature of the disposition and what is disposed of, bring the transaction within the scope of section 63. This requires an assessment of the transaction in its totality and a consideration of its labour relations (rather than commercial law) perspective. In addition to the continuity of the work or jobs (without that, a continuation of the collective bargaining relationship would make little sense) a number of other factors may be relevant to the successor rights issue. In *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691, the Board listed some of these:

“In each case the decisive question is whether or not there is a continuation of the business... the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inven-



tory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was.”

If many of the elements that made up the predecessor’s business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a “sale of a business” to which section 63 should apply. If, on the other hand, the alleged successor has its own established business organization by which it services the predecessor’s customers, the inference may be otherwise — even if it has acquired some assets or other incidental elements which might be traced to the predecessor. (See also *Kenmir v. Frizzel et al.*, [1968] 1 All E.R. 414, and *R. v. B.C. Labour Relations Board Ex parte. Lodum Holdings Limited* (1969), 3 DLR (3d) 41.)

29. The term “business” is at the heart of section 63, but it is this concept which is the most difficult to define. One usually thinks of a business as a profit-making economic activity, but in the *Labour Relations Act*, the term cannot be so restricted. The Act applies to municipalities, public libraries, universities, school boards, hospitals, and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of “business” must be broad enough to include them. And in the case of undertakings in the service sector, such things as “know how”, managerial systems, and other intangibles may be much more important factors in the overall organization than a particular physical plant or configuration of asset. In *The Tatham Company Limited* [1980] OLRB Rep. March 366, the Board suggested the following approach:

“A business is a combination of physical assets and human initiative. It is an economic organization which, in a sense, is more than the sum of its parts. In *Raymond Cote* [1968] OLRB Rep. Mar. 1211, the Board put it this way:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is “the totality of the undertaking.” The *physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and*

*operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.”*

(emphasis added)

A business is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market — profitably, in the case of private sector enterprises but, in any event, efficiently. It is one harmonious whole consisting of many interrelated parts. From a labour relations perspective, however, the employer-employee relationships take on a special significance. From this viewpoint, the importance of the business is that it generates work for employees. The entrepreneurial activities of the business require it to enter the labour market as an employer and, this in turn, may give rise to the collective bargaining relationships to which The Labour Relations Act is directed. Section 55 preserves the stability of those established collective bargaining relationships if the business, or a coherent part of it, are transferred to a new owner.”

30. The successor rights provisions can also be triggered by the transfer of “part of a business”. That is what the applicant claims has happened in the instant case. But what meaning should be ascribed to the words “part of business”? Clearly, a successorship can arise from the disposition of something less than the whole business; but to what extent can the business be sensibly subdivided? In *The Tatham Company Limited* case, *supra*, the Board defined a “business” as an integrated combination of elements all of which contribute to the business’ existence as a going concern, and all of which, in a literal sense, could be described as a “part” of the business. But if this organization is dismantled (in whole or in part) and its elements are dispersed, would bargaining rights always attach to each of the “pieces”? Surely it could not have been intended that a union’s bargaining rights would be rooted in any single fragment of the respondent’s business organization (see the list of such potential “pieces” in *Culverhouse*, *supra*).

31. The Board has found a transfer of “part of a business” where one of a chain of retail stores has been sold to a competitor (*Loblaws Groceries Limited* [1973] OLRB Rep. Jan. 72; *More Groceries Limited*, *supra*); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); and where a slaughter house, which was formerly part of a much larger integrated meat packing company, was transferred to a new owner, (*Beef Terminal* [1980] OLRB Rep. Aug. 1167); and where a firm transferred the division or department responsible for one of its product lines (*Canac Shock Absorbers* [1973] OLRB Rep. Oct. 508, *Alcan Building Products* [1968] OLRB Rep. May 213). In *Vaunclair Meats Ltd.* [1981] OLRB Rep. May 581, the Board summarized the earlier jurisprudence:

“In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization — managerial or employee skills, plant, equipment, “know-how” or goodwill, definable part of the economic functions formerly performed by the predecessor. This economic organization under-

took activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attribute of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55, the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied."

32. Two important propositions emerge from the cases which in our view are of particular relevance here. The first is one we have already mentioned; namely that the way in which a transaction is labelled or characterized has little bearing upon the application of section 63. To describe the relationship between parties as a lease, franchise, or "merely contractual" does not advance the issue one way or the other. Thus it does not assist the respondents to assert, as they do here, that the situation is "just contracting out". In *Metropolitan Parking Inc.*, *supra*, for example, the Board specifically adverted to a situation which might be described as "subcontracting" but which nevertheless could arguably support an inference of a transfer of "part" of a business:

"The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are 'contracted out' to B, and B uses his own managerial skills, plant, equipment and 'know how' to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part of a business. If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of 'part of a business') or merely permitting B to make use of A's organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience,



be purchased by B. None of these factors unequivocally demonstrates or forecloses the application of section 55 (or section 1(4).) If, however, 'but for' the transfer of such assets, licences, know-how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business — albeit a part which A no longer wishes to operate itself."

The Board went on to hold on the facts of that case that a change of subcontractors did not trigger a successorship as between them, even though there was a continuity of the employees' work.

33. The second proposition emerging from the cases is much more concrete, and was the point upon which *Metropolitan Parking Inc.* turned; namely, that while from a labour relations perspective the importance of the business is the jobs it provides for its employees, "the business" itself is not synonymous with the employees or their work. A transfer of work, by itself, is insufficient to trigger section 63:

"Despite the labour relations focus of the statute "the business" is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is a succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYQ Ltd. et al.*, (1978) 1 Can. LRBR 565:

The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees or an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it...

*But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer*

*would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.*

*(emphasis added)*

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.* [1979] OLRB Rep. Feb. 72 — a case which, like the present one, involved the consequences of a loss of a contract:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

This focus of section 55 is the business entity — the employer's total economic organization — not simply the work which the employees perform."

### III

34. With this background then, (and bearing in mind that the purpose of section 63 is to preserve not extend a union's bargaining rights,) we return to the facts of the instant case.

35. Has a "part" of Molson's business, formerly known as the Anchor Room been transferred to Amsterdam or Charming? In our view, the answer is clearly no. Its successor, the John Molson Room, still provides hospitality services (albeit of a superior quality) to a somewhat different clientele but, like the Anchor Room it remains firmly a part of *Molson's* business operated for Molson's benefit. Indeed, the evidence indicates that the operation of the John Molson Room is even more closely integrated into Molson's marketing strategy than was the case before. This part of Molson's business has not been transferred to the two subcontractors; rather, Amsterdam and Charming have been engaged to help Molson's run it better.

36. *Culverhouse, supra* listed a variety of factors which, if transferred to a new owner, might indicate a successorship. None of them are present here. It is difficult to discern any tangible parts of Molson's business which have actually been transferred. In Charming's case, the subcontractor acquired nothing at all other than the right to supply Molson's requirements with its own personnel. Amsterdam acquired the right to use certain kitchen equipment and dishes on the Molson's premises, and, no doubt, the availability of this equipment is a factor in

Amsterdam's ability to efficiently meet Molson's needs; but in view of Amsterdam's established presence in the food service industry, substantial organization in its own right, back up facilities, and recognized expertise, it is difficult to accord much significance to this fact.

37. Molson's certainly has not disposed of its whole business, nor is it easy to accept that certain kinds of work performed (not exclusively we reiterate) by four of its unionized employees should be held to constitute "part of a business" within the meaning of section 63. The situation here is readily distinguishable from the one in *Vaunclair Meats, supra*, as well as from the other "part of a business" cases referred to therein. The situation here is also distinguishable from *Thunder Bay Ambulance Services Inc.* [1978] OLRB Rep. May 467 where an ambulance service previously run by two hospitals was transferred to the employee who had been employed by them to run it, and that former employee continued to run it on his own behalf, with the same employees, very much as before. Here there are no pre-existing links between Molson's and the subcontractors, and a one year contract, terminable on notice, cannot be equated with the total and final disposition which the Board had before it in *Thunder Bay Ambulance*. In the instant case, the situation is much more like that in *Ontario 474619 Limited*, [1981] OLRB Rep. Oct. 1452, where a hotel had entered into an arrangement with a subcontractor to supply managerial and employee services for use in the operation of its hotel business. The Board found that section 63 had no application and left open the related employer issue since no such application had been made. The services provided in that case were much more extensive than those involved here, but the Board was still not persuaded that a severable, coherent, and independently operating "part" of a going concern had been transferred to the subcontractor. Nor are we.

38. We are reinforced in this view by a consideration of the actual impact of a section 63 finding on the parties herein, and the difficulty in defining the "like unit" to which (pursuant to section 63(3)) the union's bargaining rights would then apply. As we have already noted, the hospitality functions performed in the Anchor Room were never performed exclusively by members of the applicant and those functions are now distributed in a different way and performed in a different manner than they were before. It is contended by the union that the "like unit" can be described with reference to "full-time employees" working in the John Molson Room. But as the situation now exists, there are no such employees. To this extent a declaration under section 63 would be academic unless the Board were to root bargaining rights in certain kinds of work which, on the evidence, were never performed exclusively by the four employees represented by the applicant.

39. In our view, Molson's has not disposed of the Anchor Room or the John Molson Room or even the "hospitality part" of its business (whatever that may mean). Rather, Molson's is operating its business in a different way, making use of the services of subcontractors to fulfill needs which it could not meet within its own organization or with its own employee complement. If this situation is caught by the statute at all, it is under section 1(4), not section 63. We do not think there has been a disposition of "part" of a business, within the intended meaning of the successor rights provisions.

#### IV

40. In the instant case, section 1(4) was pleaded in the alternative, for, to some extent, section 63 and 1(4) are complementary. Both sections are designed to preserve the collective bargaining status quo despite commercial transaction which alter the legal identity of the employing entity, and would consequently undermine established bargaining rights. In *Brant*



*Erecting and Hoisting Limited* [1980] OLRB Rep. July 945, the Board made the following comments about the origin and purpose of section 1(4):

“Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55.”

41. Because of the amendment to section 1(4) in 1975, it is not necessary that there be shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the related employer is a functional rather than a temporal one. (For a discussion of the reasons for amendment see: *Brant Erecting, supra*, at paragraphs 13 - 14). Section 1(4) creates a regime of collective bargaining law which (like section 63), significantly modifies common law notions of “privity of contract” or “the corporate veil”. But while the language of section 1(4) is very broad, the section is not intended to be applied in every case which, in a general sense, meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully in light of the circumstances of particular cases, and labour relations policy considerations.

42. Section 1(4) does impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own — even though the arrangement may not have been undertaken for the purpose of

subverting bargaining rights (in which case unfair labour practice considerations might also arise). This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer's premises, with the first employer's equipment, in conjunction with the work performed by the first employer's own employees, and subject to the first employer's overall direction and control. In *The Great Atlantic and Pacific Company of Canada Limited* [1981] OLRB Rep. March 285, for example, legislation required "A & P" to create a new corporate vehicle to run the pharmacy department which it had established in its larger food stores. There was no anti-union motive, but the separate legal identity of the "drug company" was totally artificial from a collective bargaining point of view. And the Board issued a related employer declaration. The drug company was completely dominated by A & P, and had no business activities apart from it. The fact that the drug company hired employees, paid them and directed them in their daily activities did not obscure the reality of the situation.

43. The union argues that the language of section 1(4) is broad enough to cover a variety of subcontracting arrangements — especially those which do not involve "contracting out", but which might more appropriately be described as "contracting in", or "labour only" subcontracting. Where A enters into a relationship with B whereby B comes into A's premises to perform functions to A's specifications formerly undertaken by A's own employees, there will inevitably be what the Board in *Metropolitan Parking Inc.*, *supra*, described as a "symbiotic relationship" between the two business entities. The activities carried on by the two firms will be complementary. They will obviously and necessarily be "related", and efficiency will usually require that there be some degree of coordination, common control, or direction. That is the applicant's characterization of the situation in the instant case.

44. The Board accepts that there may be subcontracting relationships which can be characterized as a form of joint venture and could fall within the ambit of section 1(4). The Board adverted to that possibility in *Ontario 474619 Ltd.*, *supra*. The more closely the purchaser of employee services controls when, where, how, by whom and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. If at the same time the subcontractor is effectively dominated by the purchaser and it appears that the notion of a subcontract is introduced not to provide independent managerial and employee skills but rather a separate "non-union" corporate vehicle which permits the purchaser to have the same work performed in much the same way as before but beyond the ambit of its collective agreement, a section 1(4) declaration might well be warranted. It was considerations such as these which appear to have prompted the Board to issue 1(4) declarations in *Donald A. Foley Limited* [1980] OLRB Rep. Apr. 436, and *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176, even though there was no direct financial ownership of the subcontractor in either case.

45. However, in the Board's view it is both undesirable and unnecessary in the instant case to speculate about the potential reach of section 1(4), or catalogue the many factors distinguishing the present situation from that before the Board in *Normick* or *Foley*. It is clear on the evidence that Charming and Amsterdam are independent businesses, with their own established employee complement, operated for the benefit of their own principals, and providing their specialized services to a variety of purchasers of which Molson's is only one. Both businesses were in operation long before the Molson's contract, and, no doubt, they will continue thereafter. Neither is a mere shell or a device to avoid collective bargaining obligations, and neither can be regarded as an instrumentality of Molson's. We do not think the situation here falls within the intended ambit of section 1(4). And even if the prerequisites for a

section 1(4) declaration could be made out, there are compelling countervailing considerations which militate against the making of related employer declaration in the circumstances of this case.

46. Of the approximately twenty-four individuals employed in the Anchor Room the union purported to represent only four. The union never asserted bargaining rights in respect of the hostesses or the kitchen staff. They were treated as employees of Molson's who were beyond the scope of the union's bargaining rights. Whether or not as a matter of law this is actually the case, the fact remains that for years, the union never sought to represent these employees. Nor is there any evidence that the union ever complained that the functions performed by the bar stewards (for example serving beer) were shared with non-union employees. If the union were concerned about an erosion of its bargaining rights and work jurisdiction, it appears to have tolerated such erosion for some years. Yet now, the union argues that the Board should issue a related employer declaration. But that declaration would either be academic, (because the bar stewards' jobs, as such, no longer exist,) or a springboard for an assertion of rights in respect of employees and work never previously regulated exclusively by the union's collective agreement.

47. The purpose of section 1(4) is to preserve bargaining rights not extend them; but, in substance, it is an extension of bargaining rights which the applicant seeks in the instant case. Even if the applicant were able to make out the statutory prerequisites for a section 1(4) declaration, we are satisfied that in the circumstances of this case, no such declaration should be made.

48. For the foregoing reason, the union's section 1(4) and 63 applications are both dismissed.

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**1792-81-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. Charterways Transportation Limited, Respondent, v. Group of Employees, Objectors.**

**Certification Where Act Contravened – Practice and Procedure – Unfair Labour Practice – Prior Board decision finding discharge of employee for union activity – Whether members of panel in first case disqualified from hearing second case due to apprehended bias – Employer obtaining legal opinion letter from solicitor – Providing copies of letter to employees seeking information from management – Held not unlawful – Questioning of employees breach of Act – Employer violations not such as to prevent disclosure of true employee wishes at vote – No section 8 certificate issued**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. Wilson and C.A. Ballentine.

**APPEARANCES:** *J. McNamee for the applicant; Thomas Stefanik and Bill Heslop for the respondent; no one appeared for the objectors.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER J. WILSON; April 1, 1982**

1. This is an application for certification in which the applicant trade union asks the Board to apply the provisions of Section 8 of the Act.

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4. Having regard to the agreement of the parties the Board further finds that:

- (1) all employees of the respondent at Cooksville, Ontario, save and except supervisors, foremen, office staff and persons regularly employed for not more than 24 hours per week (hereinafter referred to as bargaining unit #1), and
- (2) All employees of the respondent at Cooksville, Ontario regularly employed for not more than 24 hours per week, save and except supervisors, foremen, persons above the rank of supervisor or foreman, and office staff (hereinafter referred to as bargaining unit #2),

constitute units of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in each of bargaining units #1 and #2 at the time the application was made, were members of the applicant on November 27, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Subject to whatever determination is made

under section 8 of the Act, the union does not meet the statutory membership requirements for either a vote or outright certification in either of the two bargaining units.

6. There are two preliminary matters to be disposed of before turning to the merits of this application. In a decision dated January 12, 1982 a panel of the Board comprised of the same chairman and labour representative, but a different management representative from the one assigned to hear this case, found that the company's decision to terminate Donna Fowler, a bargaining unit employee, violated section 66 of the Act. At the outset of the hearing in this matter, counsel for the respondent employer asked to have the panel assigned to the case replaced by a panel comprised of members who had had no involvement in the prior matter. He argued that in finding a company violation of the Act in the prior matter, findings of credibility were made. Counsel advised that he would be calling the same witnesses and, in these circumstances, wanted a panel comprised of members who had not already made findings of credibility in respect of his witnesses. We hereby affirm our oral ruling to deny the respondent's request. The prior exercise of a panel's quasi judicial responsibilities does not disqualify the members of that panel from hearing a related matter. The prior exercise of quasi judicial authority does not support a claim of apprehended bias.

7. The second preliminary matter relates to a series of particulars filed by the respondent employer. The respondent filed 14 paragraphs of particulars describing acts of vandalism and sabotage done to its buses during the period of the union's organizing campaign and describing threats made to persons who were opposed to the trade union. Nowhere in these particulars is there set out the name of any person who is alleged to have engaged in this vandalism or sabotage or made these threats. The Board ruled at the hearing that the respondent was free to lead all relevant evidence in defence of the allegations against it and to cross-examine on all matters relevant but that in the absence of a formal complaint it could not use these proceedings to establish alleged unlawful acts unrelated to the issues raised by this complaint. During the course of the hearing, an issue arose as to whether evidence could be led with respect to the incidents of vandalism and sabotage which took place during the relevant period as a defence to the allegation that the company carried on an inordinate number of meetings with individual employees during this period. The panel ruled that the respondent could adduce this evidence for the purpose stated.

8. There are two conflicts in the evidence before us which we must resolve. The first relates to what was said between Mr. A. Hoornweg, the terminal manager, and Mr. Dan Harris, a bargaining unit employee, in Mr. Hoornweg's office on September 9, 1981. Mr. Harris testified that he was called into Mr. Hoornweg's office on that day by Mr. Evan Weston, the operations manager. It is his evidence that in the presence of Mr. Weston, Mr. Hoornweg said that he had been informed by a reliable source that he was trying to get a union in the company. Mr. Harris testified that he denied the allegation following which Mr. Hoornweg discussed the pros and cons of unionization, said the company would not like to see a union established and suggested the formation of an employee association. Mr. Harris estimated that he was in Mr. Hoornweg's office for about 2-3/4 hours. Mr. Hoornweg gave a different account of his September 9, 1981 meeting with Mr. Harris. It is his evidence that he had been told by a bingo driver that Mr. Harris had been seen collecting names of other drivers and that he wanted to find out what he was doing. Mr. Hoornweg testified that a great deal of soliciting goes on amongst the drivers in connection with lottery tickets, hockey pools, catalogue selling etc. but that he had heard that some drivers were organizing sex parties and selling sexual aids and that it was his business to know what Mr. Harris was doing. Mr.

Hoornweg admitted that drivers are not usually called in to account for soliciting but explained that he was concerned about the “sex thing” that had come up late in the summer. It is Mr. Hoornweg’s evidence that Mr. Harris denied that he had been collecting names and then informed him that “a lot of people in our company would like to get an Association started.” Mr. Hoornweg testified that he then told Mr. Harris about an unsuccessful attempt to form an employee association in 1977 and advised him that if the employees wanted an association they should get proper advice. Mr. Hoornweg estimated the length of the meeting at 45 minutes. He acknowledged that Mr. Weston was present but could not recall who it was who informed him that Mr. Harris was collecting employee names. Mr. Weston did not appear to testify. It is to be observed that the union commenced to sign employees into membership on September 8, 1981 and that 7 of the 56 cards filed in support of the application were signed on that day and two more were signed the following day.

9. In all cases where a finding of credibility must be made, the Board considers the demeanor of the witnesses as they give their evidence, weighs the evidence against what best accords with reason and the objective facts, and takes into account any inconsistencies, contradictions or lapses of memory which call into question the accuracy or truthfulness of the testimony. Where, as in this case, there is a person who has witnessed the conversation or event giving rise to the conflict and that person is not called as a witness, the Board is entitled to draw an inference adverse to the party who could reasonably have been expected to call the person as a witness. (See *The Law of Evidence in Civil Cases*, Sopinka and Lederman, Butterworth & Co. (Canada) Ltd., 1974, p. 535.) Mr. Weston, in his capacity as operations manager of the company, was present throughout the conversation between Mr. Harris and Mr. Hoornweg on September 9, 1981. However he was not called to corroborate Mr. Hoornweg’s version. Notwithstanding his departure from the company, we are aware of no reason why he could not have been subpoenaed to testify in this matter and in the result, we are compelled to draw the inference that he would not have corroborated Mr. Hoornweg’s testimony. Having regard to the considerations which must be taken into account in assessing credibility to the timing of this conversation relative to the commencement of the organizing drive, and to the inference which must be drawn because of the failure of Mr. Weston to testify, we are compelled to resolve the conflict between Mr. Harris and Mr. Hoornweg with respect to what was said between them on September 9, 1981 in favour of Mr. Harris.

10. The second conflict in the evidence relates to what was said between Ms. Lynda Mathews, the dispatcher, and Mr. Ron Freemantle, a bargaining unit employee, on or about November 26, 1981. Mr. Freemantle testified that he had been told that there would be a union meeting on November 26, 1981 and that he asked Evan Weston, the operations manager, about it and that Mr. Weston replied that he knew nothing about it. Mr. Freemantle testified that he was called back into the office a short while later by Ms. Mathews, and in the presence of Mr. Weston, asked how many employees had signed the petition against the union and if he knew anything about the association. He testified that he was further asked if he had signed for or against the union. It is his evidence that Mr. Weston asked him to identify those who were giving him a hard time and that Ms. Mathews asked him to identify those employees speaking on behalf of the union. He testified that he asked to see Ms. Mathews again that afternoon and informed her that he didn’t want to be involved on either side to which she replied that he didn’t have to answer any more questions if he didn’t want to. Ms. Mathews testified that Ron Freemantle visited her office on the morning of November 26, as he often did, and asked about a union meeting that evening. Ms. Mathews testified that she said she



knew nothing about the meeting. She testified that he returned a short while later and said he was being bothered. It is her evidence that at this point Ray Wedley, a bargaining unit employee, summoned him away but that he returned at about 4:00 p.m. that afternoon and told her that he was being harassed by both union supporters and those circulating the petition against the union. She testified that she told him the decision was up to him and he did not have to be harassed by anyone. At this point she maintains that he asked her how many drivers the company had and when she replied quite a few he asked the exact number. She testified that at this point she felt that she was being set up and terminated the conversation. Ms. Mathews testified that although Mr. Weston was standing at the back of the room, he was on his way out at the time so that the conversation was not in front of him.

11. Having weighed the evidence of both Mr. Freemantle and Ms. Mathews, we are satisfied that Ms. Mathews attempted to elicit information from Mr. Freemantle with respect to who was pressuring him. We are satisfied that no threats, either implied or express, were made to Mr. Freemantle concerning his job security or that of anyone else and further, that he was told by Ms. Mathews that he did not have to be harassed by either those for or against the union.

12. Having resolved these conflicts, we hereby make the following findings of fact in this matter.

- (i) The company operates a school bus and charter bus service from 16 locations in Ontario, including Mississauga. The employees at five of these locations are organized and the company has negotiated collective agreements in each of these locations. The employees at two of these five organized locations (Sarnia and London) have chosen to be represented by an employee association. It is company policy that where a terminal manager becomes aware of union organizing activity, he is to notify head office and not to in any way interfere with the organizing.
- (ii) Mr. Dan Harris, a bargaining unit employee with two years' service, was called into Mr. A. Hoornweg's (terminal general manager) office on September 9, 1981 and told that the company had been informed by a reliable source that he was trying to bring in a union. He denied his involvement. Mr. Hoornweg discussed the pros and cons of unionization and suggested the possibility of forming an association. Mr. Harris, was not threatened by Mr. Hoornweg with respect to his or anyone else's job security.
- (iii) Mr. Hoornweg contacted his legal advisor and received from him, on September 16, 1981, the following letter.

I confirm that you have advised me of the fact that a number of employees of the company have approached you asking for your advice as to what they can do with respect to what appears to be an organizing attempt being made by the brewery workers union of part-time employees of Charterways Limited in Mississauga.

I also confirm your advice to me that no application for certification has been made.

I also confirm your advice to me that you have not given any advice or suggestion to your employees and that you have, pursuant to the corporate policy of Charterways Transportation Limited, advised employees that you are not able to respond to questions of that nature without first checking with company counsel.

First may I tell you that you have taken exactly the correct steps. It is clearly improper, in my view, for you to be giving employees any advice with respect to the question as to whether or not they wish to be represented by a trade union. As you know, employees in the Province of Ontario have the absolute right to join the trade union of their choice and to participate in its lawful activities. This right is protected by the provisions of the Labour Relations Act of Ontario. Although the statute does not say so, it is implicit within it that an individual also has the right not to join the trade union, at least during an organizing attempt, if he does not wish to be represented.

It is clearly improper for an employer or employer representative to undertake any activities aimed at interfering with the free exercise of that right. So strict are the rules pertaining to that subject that you are better not to venture any expressions of opinion at all on the subject of the selection of a trade union as bargaining agent, even though your right to "freely express your views" is preserved in the statute. I say this because any expression of opinion which you may make can be used through the purposes of suggesting that you have attempted to use your position as a member of management to persuade people not to join the union. Any such attempt at "persuasion" will no doubt be characterized by a trade union and, given the jurisprudence, the labour relations board as intimidation, coercion, or undue influence.

Therefore, a better view is if you ought not to say anything.

I think you should feel free to tell employees asking these questions that you are not permitted to answer those questions both as a matter of law and as a matter of corporate policy. You should feel free to provide employees with a copy of "A Guide To The Labour Relations Act" which is a layman's guide to the statute published under the authority of the Ministry of Labour. This is a document in the public domain, and although it contains many inaccuracies, it will at least apprise an employee who is capable of reading it with some notions of

his rights, obligations, and liabilities under the provisions of the statute.

In addition, you should feel free to tell any employee questioning you on the subject that this is an area of law of some specialty and is considered to be something which is beyond the experience of the general practitioner. You should be prepared to indicate to any such employee because of the difficulty of the area of law, they ought to consult a solicitor of their own choosing.

It is likely that an employee who makes that request of you will not know any solicitors. For that reason, I do not feel that there is any impropriety in your giving any employee so requesting it, a copy of this letter which not only sets forth the company position on the subject, but also contains the following list of names of lawyers who have in the past appeared before the Ontario Labour Relations Board representing groups of employees in certification applications. The list is as follows:

Robin Cumine	— 364-5371
Cy Abbass	— 363-2397
Brian Bellmore	— 598-2323

It often happens in matters of this nature that an employee will ask you whether or not he can expect to receive from the company, financial assistance, with respect to his legal fees. You are obliged to advise any such employee that these matters are strictly between him and his counsel and that you as representative of company are not permitted to discuss that matter with him nor to suggest that there might be any assistance from the company.

I trust this is sufficient for your purposes.

- (iv) Mr. Hoornweg called his supervisory staff, including Ms. Lynda Mathews, dispatcher, to a meeting in his office on September 17, 1981, advised them of the union organizing which was taking place, ordered them not to interfere and provided them with a copy of the letter he had received the previous day from his legal advisor.
- (v) The union organizing drive commenced upon the start-up of the school term, the day following Labour Day. The work force divided into a pro-union and an anti-union group early in the campaign. The evidence of two of the employee organizers who testified is that the organizing drive began to falter when the organizers ran out of people they knew personally. This occurred



near the end of September. About 90 per cent of the bargaining unit employees had been approached by the end of September.

- (vi) Mr. Fred De Beer, a bargaining unit employee with 13 years' service, first became aware of the union organizing effort on October 4, 1981 when he was given a pro-union letter by a fellow bargaining unit employee, Ms. Lora West. He took the letter to Mr. Hoornweg and asked him what he intended to do. Mr. Hoornweg told him that there was nothing he could do or say and gave him a copy of the letter he had received from his legal advisor on September 16, 1981. The letter contained the names and telephone numbers of three lawyers who have acted for employees in certification matters before the Ontario Labour Relations Board. Mr. De Beer told Mr. Hoornweg that he would probably oppose the trade union. Mr. Hoornweg also gave a copy of the letter to Mr. R. Nezezson, another bargaining unit employee who approached him and asked about the union.
- (vii) Mr. De Beer visited the office of one of the lawyers named in the letter given him by Mr. Hoornweg on October 20, 1981 and a statement in opposition to the union was drawn up. Mr. De Beer gave two of the blank statements to a fellow bargaining unit employee, Ms. Sandy Gerbrandt, and kept one for himself.
- (viii) Ms. D. Fowler, a bargaining unit employee and union supporter, was suspended from work on October 5th and terminated from her employment on October 7, 1981, ostensibly because of a poor driving record. This termination was the subject matter of the prior complaint referred to earlier. The Board, in a decision dated January 12, 1982, found that the termination of Donna Fowler was in violation of the Act. The essential findings in that decision are outlined in para. 20 as follows:

Ms. Fowler was active in a union organizing campaign at the time she was discharged. The company was aware of the campaign and one of its officials admitted to a bargaining unit employee that the company knew who the union supporters were and intended to "whittle" them out one by one. Two of Ms. Fowler's three accidents, which the company categorized as preventable on October 7th, were not categorized as preventable prior to that date. We do not accept that the company acted solely on Mr. Beggs' characterization of Ms. Fowler's accidents as preventable some 10 weeks after they occurred. The company's decision to rely on two previous accidents, which had not been classified as preventable when they occurred, must weigh heavily against it. When the company's decision in this regard is considered in light of the ongoing union organizing campaign, Ms. Fowler's involvement in it and Mr. Weston's admissions, we are

satisfied that the company, in relying on its preventable accident policy, was motivated by anti-union considerations. Accordingly, we hereby find that its decision to terminate Ms. Donna Fowler violated section 66 of the Act.

- (ix) The union applied for certification on November 18, 1981 and a terminal date of November 27, 1981 was set by the Board. The company received notice of the application on November 20, 1981. Because many of the drivers come to the terminal infrequently, the company arranged to have a copy of the notice delivered to each bargaining unit employee. The following letter was given to each driver along with a copy of the notice.

To All Drivers

Due to the difficulty of all drivers being able to read the attached Form 6, "Notice to Employees", our Legal Department were allowed permission from the Ontario Labour Relations Board to send it by registered mail or other means. You are however required to sign for receipt of the letter, so as to ensure that no one is missed.

Your cooperation will be appreciated.

Mr. Hoornweg, Mr. Weston, Ms. Mathews (the dispatcher) and Mr. De Beer delivered the notices. Mr. De Beer delivered notices to the homes of those employees who, like himself, lived in Georgetown. Because the drivers who live in Georgetown are seldom required to come into the terminal, Mr. De Beer is the person who normally takes them their pay cheques and other communications from the company.

- (x) Mr. De Beer, Sandy Gerbrandt, and Dick Nezezon, all bargaining unit employees, actively circulated statements of desire in opposition to the union following the giving of notice, during the week ending November 27th. They and 4 other bargaining unit employees visited the offices of the lawyer retained by Mr. De Beer after work on November 20th.
- (xi) On Tuesday, November 24th, Fred De Beer asked Barbara Campbell, a bargaining unit employee to sign the statement in opposition to the union and told her that the company would give the employees an association.
- (xii) Fred De Beer told Jennifer Hill, a bargaining unit employee, on October 5, 1981 that if she signed for the union she would "end upon the street with no wages". She was reassured by Mr. Hoornweg on October 7th that she would not lose her job. Mr. De Beer, when circulating the statement of desire, then told Ms. Hill on November 23rd that she could not lose her job for signing with the union.

- (xiii) Mr. Dick Nezezon, one of the bargaining unit employees circulating the statement in opposition to the union, called Belle Crawford, another bargaining unit employee, at her home on November 23rd and told her if she joined the union she would not have a job, told her the union had threatened to blow up his house, and told her that the company wanted an Association. She did not believe his statement that she would lose her job if she joined the union.
- (xiv) Mr. Nezezon called Roberto Tomano, a bargaining unit employee, at midnight on November 23rd and asked her to meet him for coffee the next day and suggested she use her school bus to meet him in the plaza. With the exception of stopping for breakfast or coffee, or going to a plaza located near the terminal, drivers are not allowed to use company vehicles for personal use. Ms. Tomano did not meet Mr. Nezezon for coffee and knew that he could not give her permission to use a company vehicle for personal reasons.
- (xv) Sandy Gerbrandt was very active in circulating the statement of desire. She met a number of drivers at the Westdale Mall on Wednesday, November 25th. While they were meeting on her bus, Linda Mathews, the dispatcher and a close friend of Ms. Gerbrandt's, approached. She beckoned Ms. Gerbrandt to leave the bus and they had a conversation outside the bus. Ms. Mathews testified she was at the mall to buy some "treats" for a safety meeting that evening (which was later cancelled) and gave Ms. Gerbrandt the name of a doctor she had asked for. Ms. Gerbrandt arranged to have another driver cover her shop runs on Thursday, November 26th so that she could devote more time to the circulation of the statement in opposition. Ms. Mathews, as dispatcher, was advised by Ms. Gerbrandt that she could not do her shop runs that day because of personal reasons.
- (xvi) Mr. Nezezon had arranged for an employee meeting to take place on Thursday evening, November 26th. At the urging of Mr. De Beer the meeting was cancelled. Mr. DeBeer announced over the in-bus radio system that the meeting had been cancelled. He had no sooner made the announcement when Mr. Hoornweg came on the air and stated that the radio was not to be used for personal messages "especially like the last one". There is a company rule prohibiting employees from using the radio for personal reasons.
- (xvii) Mr. Ron Freemantle, a bargaining unit employee with one year's service, was called into the dispatchers' office by Ms. Linda Mathews on November 26, 1981 after making inquiries with respect to the employee meeting scheduled for that evening. Ms. Mathews attempted to elicit information from Mr. Freemantle with respect to who was pressuring him to sign a union card. No threats, either implied or express, were made to Mr. Freemantle concerning his job security or that of anyone else. He was told by



Ms. Mathews that he did not have to be harassed by those either for or against the union.

- (xviii) A greater number of employees than usual were seen entering the supervisory offices of the company during the week of November 23-27.

13. The union asks the Board to certify it pursuant to the provisions of section 8 in this matter. Section 8 of the Act provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purpose of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

There are three preconditions which must be satisfied before section 8 of the Act can be applied and a certificate issued where, on the membership evidence, the union is not in a certifiable position. An employer violation of the Act must be established. It must be established that as a result of the employer violation of the Act the true wishes of the employees cannot be ascertained and finally, the Board must be satisfied that the union enjoys support adequate for the purpose of collective bargaining.

14. The Board found in its earlier decision that the respondent employer violated the Act when it terminated the employment of Donna Fowler. The essential facts which support the Board's findings of a breach of the Act are set out herein. Did the employer commit any additional breaches of the Act? With the exception of Mr. Hoornweg's attempt to influence Mr. Harris on September 9, 1981 we are unable to find on the evidence before us any additional violations of the Act. This is not to say that if we had been required to examine into the voluntariness of the statement of desire in opposition to the union we would have found it to be a voluntary expression. The statement was circulated by two individuals who could reasonably have been perceived by the bargaining unit employees as tied to management. The one, Fred De Beer, worked closely with management, acted as a conduit between the company and its Georgetown employees and, as was known to bargaining unit employees, visited the manager's office immediately upon learning of the union organizing drive. He was given a copy of the letter from the company's legal advisor reproduced above. The letter contains the names of three lawyers, recommended by the company's legal advisor, who have acted for employees against trade unions. It is not unreasonable to assume that in these circumstances Mr. De Beer might have felt himself under an obligation to his employer to follow through with formal, legally assisted opposition to the trade union. The other employee primarily responsible for the circulation of the petition, Sandy Gerbrandt, was a close personal friend of the dispatcher and was observed during working hours by the dispatcher, with apparent consent, carrying on a meeting with a number of employees in her bus at a local plaza.

15. The issue to be determined in this case, however, is not the voluntariness of the

statement in opposition but whether or not the company unlawfully interfered with the union's organizing efforts. There is no evidence upon which to find that the bargaining unit employees who were circulating the statement in opposition were acting on either the implied or express instructions of management or were making threats to the job security of other bargaining unit employees on instruction from management. While the Act allows for employer freedom of speech subject to the prohibition against coercion, intimidation, threats, promises or undue influence, we are unable to find that the giving of the letter dated September 16, 1981, prepared by the company's legal advisor, to the bargaining unit employees who sought advice from the company with respect to their opposition to the trade union constitutes a breach of the Act. However, we draw a clear distinction between the giving of the letter to employees seeking advice from management and the giving of the letter to employees not seeking the advice of management. Where the latter initiative prevails, a negative inference can be drawn with respect to the company's motive. The hand delivery of the notices in circumstances where very few of those affected would have seen the notice had it been posted in the work place does not constitute a breach of the Act. The evidence is that the use of the company's radio system to cancel the employee meeting scheduled for the evening of November 26th was done without the knowledge of the company and indeed, when Mr. Hoornweg heard the second announcement he immediately went on the air and voiced his disapproval. There is no evidence to link the increased number of visits by bargaining unit employees to the company offices to unlawful interference by the company in the protected activities of the union. Finally, we are not prepared to find that the questions put to Mr. Freemantle by Ms. Mathews on November 26th constitutes an unlawful interference by the company with the rights of Mr. Freemantle or the trade union.

16. We are satisfied that the meeting called by Mr. Hoornweg on September 9th and the comments made to Mr. Harris were motivated by anti union considerations and constitute an unlawful interference with his right to bargain collectively and with the right of the union to organize the company's employees. Having said this, however, we are compelled to observe that, while Mr. Hoornweg attempted to head off the organizing before it could gather momentum, the effect of his intervention was negligible. Mr. Harris did not accept what Mr. Hoornweg had said and in the three weeks immediately following their meeting, the union signed into membership the bulk of those who signed membership cards. On the evidence of both Mrs. West and Mrs. Fowler, it was not until the union supporters ran out of personal friends, around the end of September and before Mrs. Fowler was terminated that the organizing began to falter.

17. We must decide if the attempt by Mr. Hoornweg to influence Mr. Harris on September 9, 1981 and the termination from employment of Mrs. Fowler on October 7, 1981 have made it such that the true wishes of the employees in the bargaining unit cannot be ascertained. As is clear on the face of the section, automatic certification is not the statutory response to every employer violation of the Act committed during a union organizing campaign (see re *Radio Shack* [1979] OLRB Rep. March 248 at p. 256 and *Upper Canadian Furniture* [1981] OLRB Rep. July 1016). Where an effective remedy to an unfair labour practice, other than certification without the required membership support, can be framed, the Board will not invoke section 8. The circumstances which have triggered the application of the section are reviewed in the recently released *Globe and Mail* case, [1982] OLRB Rep. Feb. 189 as follows.

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he had been told by his employer, either expressly or impliedly, and had reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited, supra*, *Lorraine Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited* [1979] OLRB Rep. Aug. 801, *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.* [1981] OLRB Rep. April 419.)

The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See *re Radio Shack, supra*, *K-Mart, supra*, *Skyline Hotels Limited, supra* and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972.)

18. This is not a case where the employer has threatened the job security of his employees generally, nor is it a case where the employer has engaged in a pattern of misconduct which might threaten the confidence of his employees in the rule of law. The initial violation of the Act occurred on September 9 and, although we have not as yet shaped a remedy, its impact was not such as to make it unlikely that the true wishes of the employees could be ascertained. The remedial response of the Board to the subsequent violation, the reinstatement of Mrs. Fowler with full compensation and the posting of a notice acknowledging the rights of employees under the Act, coupled with the absence of any further breaches of the Act, make it likely, in our view, that the true wishes of the employees can be ascertained. Accordingly, without having to determine if the union enjoys support adequate for collective bargaining, we find that this is not a case which permits the application of section 8 of the Act.

19. We hereby declare that the company violated the Act when Mr. Hoornweg called Mr. Harris into his office on September 9, 1981 and attempted to elicit information from him with respect to the union and to influence him with respect to the advantages of forming an employee association. Accordingly, we order the company to cease and desist from any unlawful interference with the protected activity of the applicant trade union. The company is ordered to post forthwith copies of the attached notice marked "Appendix" duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not



altered, defaced or covered by any other material. In addition, because of the nature of the respondent's operation, which made it necessary for the respondent to hand deliver copies of the notice of application to the bargaining unit employees, the respondent is directed to copy and hand deliver to each of its employees the notice marked above as "Appendix".

20. The application for certification is hereby dismissed.

#### **DECISION OF BOARD MEMBER C.A. BALLENTINE;**

1. I cannot agree with the conclusion reached by the majority, that the true wishes of the employees can be ascertained by the posting of a notice and an order by the Board that the company cease and desist from any further unlawful interference with the protected activities of the applicant trade union.

2. The Board has found that the company violated the Act on two separate occasions. The first instance was on September 9, 1981 when Mr. Hoornweg, the terminal manager, called a member of the bargaining unit into his office and attempted to gain information from him with respect to the union and to influence him with respect to the advantages of forming an employee association. The second violation was October 7, 1981 when Ms. D. Fowler was fired. In that case the Board, in a decision dated January 12, 1982, reinstated Ms. Fowler with full compensation.

3. In paragraph 14 of the decision, the majority speculates that if it had been required to examine the statement of desire in opposition to the union, it would have found it not to be a voluntary expression because it was circulated by two individuals who could have been perceived by the employees as tied to management. The petition was motivated by a letter received by Mr. Hoornweg from the company's legal advisor, dated September 16, 1981. (The full content of the letter is found in the decision starting at page 555.)

4. The letter advises Mr. Hoornweg of what procedures to follow if any employees approached the company asking for advice and what they can do with respect to an organizing attempt by the Brewery Workers Union. The letter advises that an individual has the right not to join the trade union. The letter advises Mr. Hoornweg that he should feel free to provide a copy of "A Guide to the Labour Relations Act" and a copy of the letter to any employee that may approach him. The letter contains the names and telephone numbers of three (3) solicitors who have in the past appeared before the Ontario Labour Relations Board in certification applications.

5. Mr. Hoornweg gave evidence that he called in his supervisory and office staff on September 17th and gave them a copy of the letter. He later gave copies to Fred De Beer and Dick Nezezon, the two individuals who circulated the petition.

6. The majority have found in paragraph 15 of the decision that the letter prepared by the company's legal advisor and given to Mr. De Beer, Mr. Nezezon and other employees, is not a breach of the Act. It is my position that the letter is a skillfully contrived document which was used by the company to motivate opposition to the trade union. When this is coupled with the violations of the company on September 9th and October 7th, it presents a well organized scheme executed by the company for the express purpose of defeating the union's organizing campaign — all of which is illegal. In total, it is a gross interference with the protected activity

of the applicant trade union and the right of employees in the bargaining unit to join a union of their choice.

7. The company's scheme to defeat the union's organizing campaign started on September 9th when Mr. Hoornweg, its terminal manager, violated the Act, and it never let up until the union's organizing campaign was chilled near the end of September and came to a complete stop after one of its organizers was fired illegally on October 7th. After October 7th the union continued its endeavour to sign up more people but to no avail. The opposition team led by Mr. Fred de Beer was operating in high gear aided and motivated by the letter dated September 16, 1981 which the company received from its legal advisor. The applicant trade union never had a chance; the organizing drive was dead because of the company's illegal acts. It is my position that the applicant trade union has satisfied the three preconditions necessary to obtain a certificate under section 8 of the Act. These preconditions are as follows:

- (1) The employer has violated the Act.
- (2) The true wishes of the employees cannot be ascertained because of the illegal acts of the company.
- (3) The applicant trade union has adequate support for purpose of conducting collective bargaining.

It is my opinion that a certificate should be issued to the applicant trade union.

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## Appendix

### The Labour Relations Act

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# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY ATTEMPTING TO ELICIT INFORMATION FROM ONE OF OUR EMPLOYEES WITH RESPECT TO THE UNION AND TO INFLUENCE HIM WITH RESPECT TO THE ADVANTAGES OF FORMING AN EMPLOYEE ASSOCIATION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE  
LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

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CHARTERWAYS TRANSPORTATION LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced**

**This notice must remain posted for 60 consecutive working days.**

DATED this

day of

. 19 82 .



**2099-81-R United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., Applicant, v. Daltons (1834) Limited, Respondent, v. Group of Employees, Objectors**

**Membership Evidence – Non-pay established – In-plant organizer misleading full-time organizer and Board as to collection of dollar – Board not attaching any weight to any of cards collected by in-plant organizer**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J.A. Ronson and O. Hodges.

**APPEARANCES:** *James Hayes and Vincent Gentile for the applicant; R.C. Filion, D. Grierson, Glen Whyte, Bruce Moyle and Russ Plawink for the respondent; Thomas R MacInnis and Andy N. Purushuttam for the objectors.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER J.A. RONSON; April 13, 1982**

1. This is an application for certification.
2. The respondent company filed a written allegation in this matter that Manuel Fernandes, an employee of the company presently on layoff, signed a membership card in the applicant union but failed to pay the required \$1.00.
3. The payment of \$1.00 by each person on whose behalf membership documents are filed by a union in support of an application for certification is required under the Act. The payment of \$1.00 evidences the thoughtful intention of an employee to join the trade union. Section 1(1)(1) of the *Labour Relations Act* defines a union member as follows:
 

“member”, when used with reference to a trade union, includes a person who,

  - (i) has applied for membership in the trade union, and
  - (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union.
4. Subject to a verification of the employee signatures shown on the membership documents and the filing of a Form 9 by a person who has inquired of those acting as collectors, confirming that \$1.00 has been paid by each of the employees on whose behalf membership documents have been submitted, the Board, as directed by the statute, relies on the written evidence of membership. Because the written evidence is a form of documentary hearsay, and because the Board is making determinations on the basis of it which create important rights and trigger statutory duties and obligations, an investigation is undertaken in all cases where it is alleged that the membership evidence, as filed, is false. Because the Board is under a statutory direction to preserve the secrecy of union membership wherever possible, an officer of the Board is assigned in these cases to contact the employee who is alleged not to have signed a card or paid the \$1.00 and to obtain from him a signed statement as to whether or not

the dollar was paid. Where the employee states that he has not signed the card or paid the dollar, the matter is put on for a hearing.

5. The union filed a membership card on behalf of Mr. Fernandes indicating on its face that he had paid one dollar and submitted a Form 9 attesting to the collection of one dollar from Mr. Fernandes. When the allegation in respect of his failure to pay the one dollar was filed, therefore, an officer of the Board contacted Mr. Fernandes and made the necessary inquiries of him. Having regard to the report of the officer, the matter was put on for a hearing.

6. Mr. Fernandes testified that he was approached by Andy Purushuttam, a fellow bargaining unit employee, on December 31st in the company lunchroom and asked to sign a union membership card. He testified that he signed the card but was not asked to nor did he pay \$1.00 to Mr. Purushuttam. It is his evidence that he was never asked to pay the \$1.00 although Mr. Basil John, the company's shipper, the bargaining unit employee who acted as the chief in-plant organizer and the person whose signature appears as the collector on the membership card filed on behalf of Mr. Fernandes, approached him two or three weeks after he signed and asked him if he had paid the \$1.00. Mr. Andy Purushuttam, who appeared at the hearing representing a group of employees opposed to the application, testified that he was given two membership cards by Mr. Basil John and asked to sign into membership two employees. He maintains that he was never directed to collect \$1.00 from those he signed. He did not collect \$1.00 from Mr. Fernandes and testified that when he returned the signed card to Mr. John, Mr. John tore off the receipt portion of the card and threw it away. Mr. Purushuttam later advised the company that Mr. Fernandes had failed to pay the \$1.00.

7. Mr. John testified that he instructed Mr. Purushuttam to collect the \$1.00. It is his evidence that he returned Mr. Fernandes' signed card to him in his office at about noon on January 4, 1982 and told him that he had not collected the \$1.00. Mr. John testified that he knew he had to collect the \$1.00 from Mr. Fernandes. It is his evidence that at about 3:30 p.m. that day he went to an adjacent building where Mr. Fernandes was working and, in the presence of Mr. Tadao Hoshi, another bargaining unit employee, asked him for the \$1.00 he owed, was given it by Mr. Fernandes, gave him the receipt (which surprisingly he had already dated December 31st) and filled in the back of the membership card. Mr. Hoshi recalled that Mr. John asked for and received the \$1.00 but, when asked in cross-examination, denied that Mr. John had given anything to Mr. Fernandes and answered in the negative when asked if Mr. John had written anything down. Mr. Fernandes recalled speaking with Mr. John and Mr. Hoshi at about 3:30 p.m. on January 4th but denied that the \$1.00 was asked for or paid by him. The evidence establishes that the two of them were in Mr. John's office for two or three minutes before Mr. Fernandes commenced his shift at 3:30 p.m. on January 4th but that Mr. John did not ask him for the dollar at that time. Mr. John testified that he was too busy completing his bills to ask for the \$1.00. However, he had earlier testified in explaining his decision to go to an adjacent building to ask Mr. Fernandes for his \$1.00 that it was "very slow" that day.

8. Mr. John testified that he had been instructed at the outset by Mr. Vince Gentile, the full-time union organizer and the union official who signed the Form 9, that he must collect \$1.00 from each employee signed into membership. When examined by the Board, he testified that he understood the instruction and that each employee paid the \$1.00. It was later revealed in examination-in-chief, however, that Mr. John had not collected \$1.00 from any of the employees he signed into membership prior to December 22, 1981. Mr. Gentile testified that there were 10 or 11 cards signed before December 22nd and that none of the employees who

signed these cards had paid \$1.00. It is his evidence that he and Mr. John visited the homes of these employees between Christmas and New Year's and either had them sign new cards and pay the \$1.00 or simply pay the \$1.00 owed in connection with the initial card which had already been signed. The evidence that some of the cards which had already been signed were filed with the application after the \$1.00 had been collected between Christmas and New Year's is difficult to reconcile with the fact that all of the cards submitted in support of the application are dated on or after December 22nd.

9. Mr. John's signature appears as the collector on twenty of the twenty-nine cards filed with the application. Both Mr. John and Mr. Gentile testified that Mr. Gentile visited Mr. John's home on January 11, 1982 and asked him with respect to each individual card if the person whose signature was shown had actually signed and paid the \$1.00. Mr. John answered in the affirmative with respect to each card. There is no evidence that Mr. Gentile personally knew any of the bargaining unit employees other than Mr. John. It is to be observed that Mr. John testified that he informed Mr. Gentile that Andy Purushuttam had signed Mr. Fernandes into membership, had failed to collect the \$1.00 but that he had collected it at a later date. Mr. Gentile was unequivocal in his evidence that Mr. John said nothing about Andy Purushuttam signing anyone into membership. Indeed, Mr. Gentile testified that Mr. John had created the impression that he had signed Mr. Fernandes into membership.

10. When called upon to make findings of credibility, the Board must consider the demeanor of the witnesses as they give their testimony, assess the testimony against what best accords with reason and the established facts, and consider any lapses of memory or obvious false statements which reflect on the truthfulness of the evidence tendered. The critical conflict in the evidence before us relates to whether or not Mr. Fernandes paid \$1.00 in support of his application for membership in the union. Mr. Fernandes says that he did not. We start by observing that we found nothing in the demeanor of Mr. Fernandes which would suggest that he was not telling the truth. On the other hand, we found Mr. John to be evasive on occasion and unsure of himself under cross-examination. In addition, there are two less critical conflicts in the evidence that we would resolve against Mr. John. Firstly, Mr. John testified that he instructed Mr. Purushuttam to collect \$1.00 when he signed an employee into membership. Mr. Purushuttam testified that he received no such instruction. We are not prepared to accept that Mr. John would have instructed Mr. Purushuttam to collect a dollar in every case when the evidence is that at the time he himself had not collected a dollar from any of the ten or eleven employees he had signed into membership. We are satisfied that Mr. Purushuttam who did not collect the \$1.00 from Mr. Fernandes was not asked to do so. Secondly, Mr. John testified that he advised Mr. Gentile on January 11th that he had not signed Mr. Fernandes into membership. Mr. Gentile, who we believe, testified that he was not so advised but led to believe that the opposite was true. Furthermore, we find it very surprising, given the sequence of events recounted to us by Mr. John, that he would not have asked Mr. Fernandes for the \$1.00 when the two of them were alone in Mr. John's office for two or three minutes shortly before 3:00 p.m. on January 4th. Mr. John maintains that he was too busy at the time but earlier in his testimony stated that January 4th was "very slow". It is his evidence that instead, he made a special trip to another building at 3:30 to collect the one dollar in the presence of Mr. Hoshi. While Mr. Hoshi and Mr. John corroborate each other's testimony with respect to the actual transfer of the dollar, their evidence is at variance with respect to whether or not a receipt was provided by Mr. John and whether or not Mr. John asked Mr. Fernandes his telephone number and completed the back of his membership card. Mr. John maintains that he did and Mr. Hoshi maintains that he did not. We reiterate that Mr. Fernandes, who gave his evidence in a convincing fashion, was unshaken in his testimony that he did not pay the \$1.00.



11. Having made the necessary assessments with respect to credibility, we are satisfied that Mr. Fernandes did not pay the \$1.00 and further, that Mr. John misled Mr. Gentile, the Form 9 signatory, in this regard.

12. Mr. John acted as the collector on 20 of the 29 membership cards tendered in support of the application. The Form 9 attesting to the fact that each of the employees on whose behalf membership cards were submitted had signed and paid the \$1.00 was signed by Mr. Gentile on the basis of the card by card inquiry he made of Mr. John on January 11th. Mr. Gentile did not personally know the bargaining unit employees who had to be approached because of the failure of Mr. John to collect the \$1.00 from those who signed prior to December 22nd and accordingly he relied upon Mr. John to identify these employees and to guarantee that the persons who paid the dollar were the same as those whose signatures appear on the membership cards. It must be presumed that this is why he went through a card by card check with Mr. John on January 11, 1982. The evidence establishes that Mr. John misled Mr. Gentile with respect to who signed Mr. Fernandes into membership but more importantly, he misled Mr. Gentile with respect to the failure of Mr. Fernandes to pay the required \$1.00. We have also found that he attempted to mislead this Board. In these circumstances, and following the approach taken by the Board in *re Webster Air Equipment Co. Ltd.* 58 CLLC ¶18,110; *Inco Limited* [1966] OLRB Rep. Jan. 698; *Emanuel Forest Products* [1977] OLRB Rep. Feb. 37 and *Crock & Block Restaurant and Tavern* [1980] OLRB Rep. April 424, we are not prepared to put any weight on any of the twenty cards filed by the applicant which show the signature of Mr. John as collector.

13. The union has applied under section 8 in this matter. The section provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employer's organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

If the cards which bear the signature of Mr. John as collector are disregarded, as we have found they must be, the union membership support, depending on the ultimate resolution of the bargaining unit disputes which are before us, rests at between 12.5 and 16.5 per cent. While the percentage of membership support enjoyed by the applicant appears to be marginal on its face, we are of the view that it is nevertheless premature to make a finding as to whether or not the applicant enjoys membership support adequate for collective bargaining. The point at which the Board will determine whether there is support adequate in any given case will depend, in part, on both the timing and nature of the unfair labour practice violation. The unfair labour practice allegations are still to be heard in this matter and accordingly, we hereby reserve our decision with respect to whether or not section 8 should be applied until we have heard all of the relevant evidence.

#### **DECISION OF BOARD MEMBER OLIVER HODGES;**

1. I dissent.

2. The evidence adduced with regard to the allegation of fraud made by the respondent in its letter dated January 27, 1982 to the Board is equivocal. The letter also erred in the plurality of the allegation — only one person was named as a “non-pay”, a Mr. N. Fernandes.

3. Manuel N. Fernandes signed a union card on 31st December, 1981 when it was presented to him by Andy N. Purushuttam (“Andy”). No money was paid at that time. My understanding of the evidence-in-chief given by Andy is that he asked for the dollar payment as he had been instructed. However, in response to further questions by counsel he said “John only told me to get the card signed”.

4. Andy claims that he delivered the signed card to Basil John at John’s house that same afternoon. John testified that the card was delivered to him by Andy in the warehouse shipping office at noon on Monday, January 4, 1982. No dollar accompanied the card. Fernandes testified in cross-examination that his first knowledge of a non-pay allegation came on 26th February when interviewed by a Board Officer. At that time he signed a declaration that he had not paid the dollar.

5. Andy testified that he asked Fernandes more than once whether he had paid his dollar “just to check to see if he had paid in the meantime,” and was told “no”. One of these occasions was about the time Andy started to circulate a petition against the union, 2 or 3 days after the green sheet went up.

6. John testified that the first knowledge he had of the non-pay allegation was a week before the Board hearing, and that it was only on the afternoon of the day preceding the hearing that he was told by counsel for the union that it was the Fernandes card which was in question.

7. Fernandes, in my opinion, was either mistaken or he deliberately told a lie when he testified in cross-examination that John asked him in the third week in January if he had paid the dollar. Andy testified in chief that he had asked Fernandes in the New Year if he had paid the dollar. John testified he collected the dollar on Monday, 4th January. Asked in chief whether Fernandes would be lying if he denied the circumstances under which he paid the dollar, John’s emphatic response was “yes”. Obviously, John would have no reason to question Fernandes about the dollar at a later date.

8. The testimony of John with regard to the collection of the dollar from Fernandes at 3:30 p.m. on Monday, 4th January has the merit of eyewitness “Tad” Hoshi. John holds the responsibility of head shipper and receiver for the company. Hoshi has nine years of service as a fork lift operator in the company warehouse. I find little probative value in the question as to why John did not ask for the dollar at 3:00 p.m. when Fernandes was in his office, as opposed to his getting it at 3:30 p.m. during a work break in the warehouse where there was some flooding because of a clogged drain. This would obviously make things busy for Fernandes, who cleans the warehouse as part of his duty, and probably slower for a fork lift operator. That John testified he was busy writing bills in his office at 3:00 p.m. does not strike me as unusual or contradictory.

9. Fernandes did not deny that he signed the union card in the two places indicated on the face of the card; one signature to authorize the union to represent him in collective bargaining and the other signature to certify that he paid the dollar initiation fee required.

Andy testified that Fernandes “signed twice” and that “I did not get the dollar.” Fernandes also dated the card when he signed it. The date written on the back of the card by Basil John is the same as the date written by Fernandes. The contradiction in the evidence on this point is plain and there is no satisfactory explanation for it. However, the testimony concerning the crucial question, *was the dollar paid to the person signing as collector*, does carry the weight of corroboration by an eyewitness. Furthermore, the testimony of John and Hoshi is given by men who hold responsible jobs. Fernandes, on the other hand, was employed for only eight months before being laid off on 11th February, some two weeks before making a declaration to a Board Officer that he had not paid the dollar in question.

10. John indicated that he had given blank cards to Andy because “he wanted to help”. The evidence of Andy is that John and Gentile came to his house one night between Christmas and New Year’s to collect the dollar for his own card, which is dated 22nd December, 1981. That Andy knew the importance of the dollar payment when he signed Fernandes is quite clear. Andy’s interest in the organizing campaign is evident from the uncontradicted testimony of John that Andy came to his house between Christmas and New Year’s and asked to see the cards of those who had signed. When questioned about this by counsel for the applicant, Andy said he was “just curious”. However, it was not long after he signed Fernandes that he decided to actively oppose the union and told a supervisor, Pat Feeney, that Fernandes had told him that he never paid a dollar.

11. Given the adversarial interest of the respondent in bringing this very serious charge to the attention of the Board, and considering the equivocal evidence adduced in support of the non-pay allegation, I am persuaded that the union has made a true and convincing explanation of the actual collection of the Fernandes dollar. I cannot accept the majority finding that the dollar was not paid. I would therefore dismiss the allegation brought by the respondent company as not having been proven.

12. This unfortunate matter could have been avoided by insisting upon a simple rule which every organizer can easily follow: “Accept application cards *only* when accompanied by the initiation fee”. Collective bargaining is a very serious proceeding. The responsibility for organizing one’s fellow workers to acquire bargaining rights requires careful and sincere attention to a few quite simple but important rules. Otherwise, as evident here, the benefits of collective bargaining are delayed and employees lose temporarily the advantages so clearly evident in a collective bargaining agreement.

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**2413-81-M** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen Local #12 — Kitchener, Applicant, v. **Ellis Don Limited**, Respondent

**Construction Industry Grievance – Jurisdictional Dispute – Practice and Procedure – Parties given notice of hearing – Employer participating in grievance procedure and attending meeting with Labour Relations Officer – Not appearing at Board hearing in erroneous belief that grievance settled in favour of jurisdictional complaint – Whether employer meeting “reasonable diligence” test – Board finding contravention of collective agreement on uncontradicted evidence of union – Permitting time for filing of jurisdictional complaint upon finding jurisdictional dispute underlying grievance**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and O. Hodges.

**APPEARANCES:** *B. Chercover, B. Strickland and D. DeMonte for the applicant; no one for the respondent.*

**DECISION OF THE BOARD:** April 30, 1982

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. The Board is satisfied that the necessary preliminary steps have been taken to give the Board jurisdiction in this matter.

2. The respondent Ellis Don Limited and also the Painters' Union Local 1824, although having been given notice of the hearing by the Board, and having attended a prior meeting on February 24, 1982 convened by a Labour Relations Officer of the Board in connection with the same matter, failed to appear at the hearing. The Board accordingly proceeded to receive the evidence and submissions of the applicant.

3. Evidence in support of the grievance was given by Mr. Brian Strickland, the applicant's Kitchener Business Representative since 1967. Mr. Strickland testified that the respondent, Ellis Don Limited, has long had a collective bargaining relationship with the applicant, and is currently bound by the provincial collective agreement covering construction work in the industrial, commercial and institutional sector. A booklet copy of that collective agreement was produced to the Board, and Ellis Don appears on the list of contractors in Schedule A to that agreement. Mr. Strickland learned of a YMCA building project in the City of Kitchener, involving the construction of four racquet-ball courts, and attended at the job site to inquire into the assignment of work. There he spoke with a foreman of the subcontractor beginning the work, Northwest Plastering Limited. The applicant has no collective bargaining relationship with that company. Mr. Strickland asked the foreman if he was aware of the applicant's subcontracting clause, and the foreman replied that he was not. The foreman added that Northwest Plastering had a collective agreement with the Painters' Union in Toronto. Mr. Strickland testified that there was no one present on the job representing the general contractor, Ellis Don Limited, and that he asked the foreman of Northwest Plastering to employ members of the applicant union on this job. When Mr. Strickland returned to the job site the next day, he was advised by the foreman that he was willing to employ one man from the applicant union, but at the same time told Mr. Strickland that he was to call the Painters' business agent, Sergio Panterotto. The member of the applicant union did in fact work one day on the job, but Mr. Strickland then received a visit from the Local Painters' Union

representative, who indicated that this arrangement was not satisfactory. No member of the applicant union was employed on the job thereafter. Mr. Strickland filed a grievance with Ellis Don, and further discussions ensued involving Mr. Strickland, representatives of the Painters' Union, Northwest Plastering, and Mr. Peter Van Cook, Executive Assistant to the President of Ellis Don Limited. Mr. Van Cook took the position that this was a jurisdictional dispute, and no change in favour of the applicant was made in the assignment of work. Mr. Strickland personally attended at the job site from time to time during the period February 15th to March 4th, 1982 inclusive, and was able to observe the work being performed by employees from Northwest Plastering who were not members of the applicant union.

4. The Board at the conclusion of the hearing as usual reserved its decision, essentially to review the evidence with respect to quantum of damages. Prior to the Board's decision being formally issued, however, the respondent Ellis Don, through its solicitor, wrote to the Board requesting that the matter be reopened and scheduled for a further hearing, on the basis that Mr. Van Cook of the respondent had left the Labour Relations Officer's meeting convened on February 24, 1982, with the erroneous impression that the matter had been settled. The respondent contends that it was clear at the Officer's meeting that the issue underlying the grievance was a jurisdictional dispute between the applicant and the Painters' Union, and the respondent's. Mr. Van Cook took it from that that the grievance, insofar as the respondent itself was affected, had been settled.

5. While not strictly a matter of "reconsideration", the results of the Board hearing held on March 8th were such that it is appropriate to view the issue as if it were, and the parties to the proceedings have argued the point on that basis. The applicant takes the position that the matter is now final, and relies on the Board's well-established practice with respect to requests for reconsideration, reflected, for example, in the case of *Canadian Union of General Employees*, [1975] OLRB Rep. April 320, at paragraph 11:

11. Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.* [1963] OLRB Rep. 234, 64 CLLC ¶ 15,493 (Ont. H.C.); *Detroit River Construction Case* (1962) CLLC ¶ 16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board's attention to the object of its concern.

6. Here the respondent was content to let the matter rest on the assumption that the real issue to be litigated was the competing jurisdictional claims of the two trade unions. The respondent, however, took no steps to ensure that the jurisdictional dispute was being processed to litigation by any party, including itself, or to ensure by formal steps that the hearing scheduled for March 8th had been cancelled. Such manner of proceeding clearly falls short of any "reasonable diligence" standard which the Board has articulated. To protect the settlement process as a whole, the Board is particularly reluctant to place any weight on allegations of statements made by or in the presence of a Labour Relations Officer, whether

such statements would be technically privileged or not, and a party faced with formal notice of a Board hearing must bear the burden of either appearing at that hearing to ascertain its status, or of confirming in a formal way that the hearing will not take place. If the respondent had any concern with its liability in this matter, the time to consult with its solicitor was before the Board's scheduled hearing, and not after. To the extent, therefore, that any significant prejudice must befall a party as a result of the occurrences in these proceedings, that prejudice must fall upon the respondent, and the applicant is entitled to the benefit of the evidence and representations which it placed before the Board at the hearing it attended on March 8th.

7. Counsel for the respondent, however, points out that it is the Board's normal practice, when satisfied that the true issue underlying a grievance referred to the Board under section 124 of the Act is a jurisdictional dispute, to defer a final determination of the grievance until the parties have had an opportunity to litigate the merits of the jurisdictional dispute. In the circumstances of this case, where the respondent at all times prior to the scheduled date for hearing actively participated in the grievance process, including attendance at the meeting convened by the Board's Labour Relations Officer, and where, having made its position clear to the applicant from the outset that its defence to the apparent violation of the collective agreement was its reliance on the competing jurisdictional claim of another trade union, the respondent notified the Board within two (2) days of its error in not attending the Board hearing, it is appropriate to weigh the comparative prejudice to either party in dealing with the respondent's request.

8. The applicant is entitled to the benefits of the time and expense it spent at the Board on March 8th, and ought not to be forced to re-litigate the issues so determined by the Board because of a lack of diligence on the part of the respondent. The Board finds, on the uncontradicted evidence of the applicant's witness, Mr. Strickland:

- (1) that the respondent Ellis Don Limited is bound by the applicant's province-wide collective agreement covering construction work in the industrial, commercial and institutional sector;
- (2) that as a result of a subcontract let by the respondent to a company by the name of Northwest Plastering, work covered by the aforesaid collective agreement involving 208 hours from February 15th to March 4th, 1982 inclusive, was performed at the YMCA site in Kitchener by members of Painters' Union Local 1824, rather than by members of the applicant, contrary to Article 1(c) of the aforesaid collective agreement;
- (3) that the value of that work to the applicant and its members, pursuant to the terms of its collective agreement, is \$3,296.80.

9. The Board is satisfied, however, on the evidence which it has before it, that the applicant's claim does in fact involve a jurisdictional dispute between competing unions, of the kind which would have prompted the Board, had the respondent attended the hearing on March 8th, to have adjourned the proceedings at the respondent's request, pending an opportunity to litigate that jurisdictional dispute. The Board accordingly makes its findings of liability against the respondent under its collective agreement with the applicant, and any consequent direction to pay damages in accordance with that violation, contingent upon an



opportunity being given to the respondent to have the jurisdictional dispute underlying this matter litigated before the Board. The Board will therefore permit a period of ten (10) days from the date of this decision for any party to these proceedings to file with the Board under section 91 a "jurisdictional dispute" claim with respect to the work in dispute in the instant proceedings. Otherwise, the Board will proceed to finally dispose of this application of the basis of the material presently before it.

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**0686-81-JD Harold R. Stark Company Limited, Complainant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Labourers' International Union of North America, Ontario Provincial District Council, A Council of Trade Unions for Teamsters Local 230, and Labourer's Union, Local 597, Respondents, Oshawa Paving Ltd., Oshawa Area Signatory Contractors, Interveners**

**Jurisdictional Dispute – Reconsideration – Prior decision that matter not within jurisdictional dispute provisions of Act – Reconsideration application based on section 91(18) – Whether conflict between two bargaining unit descriptions exists – Interpretation in *Napev Construction* case affirmed – Reconsideration denied**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBERS C. A. BALLENTINE; April 16, 1982**

1. The applicant, Harold R. Stark Company Limited ("Stark"), has requested that the Board reconsider its decision of February 8, 1982, wherein it concluded that this matter did not come within the provisions of section 91 of the *Labour Relations Act*.
2. Stark is bound by the terms of the provincial agreement relating to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the "U.A.") as well as by the terms of the provincial agreement relating to the Labourers' International Union of North America (the "Labourers"). Stark has sublet certain work to Oshawa Paving Ltd. and, accordingly, has no employees of its own engaged in performing the work. Oshawa Paving is bound by a collective agreement with a council of trade unions of which Labourer's Local 597 is a member. U.A. Local 463 has filed a grievance against Stark under the U.A. provincial agreement claiming that the company violated the agreement by not subletting the work in question to a firm bound by a U.A. agreement. Neither U.A. Local 463 nor Stark sought to get Oshawa Paving to reassign the work to members of the U.A. Stark did, however, file the instant complaint under section 89 of the Act.
3. In its decision of February 8, 1982, the Board reviewed both the wording of section

91(1) of the Act as well as the legal precedent underlying the section and concluded that Oshawa Paving and not Stark was the “employer” within the meaning of section 91(1), and that, accordingly, Stark could not bring a complaint under that subsection. In its request for reconsideration, Stark requested that the Board treat this application as falling under section 91(18) which provides as follows:

Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreements as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

4. For the purpose of these proceedings, we will assume that Stark is an employer within the meaning of section 91(18). Section 91(18) speaks to situations where an employer is bound to two or more collective agreements where it appears that the description of the bargaining units conflict. The bargaining unit covered by a collective agreement is generally set out in a “recognition clause” at the commencement of the agreement. The recognition clause in the two relevant provincial agreements are as follows:

*The U.A. Agreement*

ARTICLE 1 — DEFINITIONS

- 1.1 “Association” means the Mechanical Contractors Association Ontario and any successor or assign.
- 1.2 “Council” means the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and any successor or assign.
- 1.8 “Employee” means a qualified and/or Certified Journeyman or Apprentice employed by a Contractor as a plumber, steamfitter, pipefitter, welder, and apprentice thereof, or job foreman.

ARTICLE 2 — RECOGNITION

- 2.1 The Association agrees to recognize the Council as the sole collective bargaining agent for all employees of the Contractors as defined in Definition 1.8.

*The Labourer's Agreement*

ARTICLE 1 — RECOGNITION

- 1.01 The E.B.A [Employer Bargaining Agency] recognizes the Union as

the sole and exclusive bargaining agent for all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all other construction Employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, for whom the Union has bargaining rights.

5. The U.A. agreement, as is the norm in the construction industry, clearly covers a craft bargaining unit, namely journey men and apprentice plumbers, steamfitters, pipefitters and welders. Labourers have not been recognized by this Board as a "craft" under section 6(3) of the Act, but the general practice in the industry when executing collective agreements and the general practice of this Board when granting certificates, is to describe labourers' units using "craft-type" language, that is, by reference to "all construction labourers", as opposed to grouping the labourers into an "all employee" industrial-style bargaining unit. The recognition clause in the Labourers' provincial agreement does use "industrial-type" language when referring to employees engaged in cement finishing, waterproofing or restoration work and others "for whom the Union has bargaining rights". Stark is not engaged in cement finishing, waterproofing or restoration work. Further, it appears that the only employees the Labourers' union claims to represent vis-a-vis Stark are construction labourers. Accordingly, the only part of the Labourers' recognition clause which is relevant to these proceedings is that utilizing "craft-type" language wherein the union is recognized as the exclusive bargaining agent "for all construction labourers". Accordingly, on the basis of the recognition clauses, there appears not to be any conflict in the bargaining units. The U.A. holds bargaining rights for a unit of journeymen and apprentice plumbers, steamfitters, pipefitters and welders while the Labourers' union holds bargaining rights for a unit of construction labourers.

6. In seeking to bring this matter within section 91(18), Stark clearly regards as relevant the following articles in the two provincial agreements:

*The U.A. Agreement*

ARTICLE 9 — TRADE OR WORK JURISDICTION

9.1 The parties to this agreement recognize that it is the employer's sole responsibility to assign work. The employer agrees not to assign work contrary to existing area practices and/or existing jurisdictional awards. The reference herein to area practice and/or jurisdiction awards must be area practices and/or awards that have been accepted and practiced on projects between unions.

• • •

9.3 Subject to the conditions contained in Clauses 9.1 and 9.2 above this agreement covers the unloading, distribution and hoisting of all equipment and piping for plumbing and/or pipe fitting systems, and the installation and handling of all plumbing, pipe fitting and industrial process control systems including all hangers and supports.

• • •



## ARTICLE 11 — SUB-CONTRACTING

- 11.1 Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement.

### *The Labourers' Agreement*

## ARTICLE 2 — UNION SECURITY, WORK JURISDICTION, ASSIGNMENT OF WORK, SUBCONTRACTING

- 2.01 The Employer agrees to employ only members in good standing of the Local Union specified in Article 1.03 for work covered by this Agreement.
- 2.02 As a condition of continuing employment, all Employees shall maintain in good standing their membership in the Local Union.
- 2.03 The employer acknowledges and agrees that the work covered by this Agreement is within the exclusive jurisdiction of the Union and its affiliated bargaining agents, notwithstanding the claims of any other Trade Union.
- 2.04 The Employer agrees that notwithstanding the claims of any other Trade Union, it shall assign exclusively to members of the Union and its affiliated bargaining agents all of the work covered by this Agreement.
- 2.05 The Employer agrees to engage only sub-contractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract, except the work described in Schedule "D" hereof.

Presumably the view of Stark is that these provisions create overlapping claims on the part of both unions to the work in dispute.

7. We regard the above articles as going to the work jurisdiction of the two unions and not directly to describing the bargaining units of employees set out in the collective agreements. We recognize that the bargaining rights of a union which represents a unit described in terms of particular craft or classification of employees are circumscribed by the union's work jurisdiction. Nevertheless, there remains a distinction between the two. A craft bargaining unit sets out the craft or classification of employees the union holds bargaining rights for. Jurisdictional issues determine what work the employees involved will perform. Section 91(18) refers only to applications to determine conflicts between the description of two bargaining units. Here there is no such conflict. To the extent there may be a conflict it is to be found in the competing work jurisdictions of the two unions and attempts to enforce those

jurisdictions. That is a matter which, when the preconditions set out in the subsection are met, section 91(1) is meant to deal with. The preconditions for a complaint under section 91(1), however, have not been met in this case.

8. In its request for reconsideration, Stark also submitted that the purpose of section 91 is to provide a full forum for all parties to resolve competing work claims by competing trade unions. The section however, is not worded broadly enough to cover the type of situation before us. As the Board noted in the *Napev Construction Ltd.* case, [1980] OLRB Rep. Feb. 247, the section addresses itself to direct work assignments from employers to persons who are or who could become employees and not contractual relations between general contractors and their subcontractors. The Board's mandate for intervening in this aspect of labour relations is limited by the specific words employed in section 91(1).

9. Having regard to the above, the request for reconsideration is denied.

#### **DECISION OF BOARD MEMBER J. WILSON;**

As in the original decision, I am in disagreement with the majority report and still feel that this matter should be treated as a jurisdictional dispute.

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### **2096-81-OH Anthony Frangis, Complainant, v. Refinery Management Imperial Oil Ltd. Sarnia Refinery Sarnia, Ontario, Respondent**

**Health and Safety – Employee designated under Act as “competent person” – Responsible for certifying work area safe – Claiming method of sand-blasting unsafe and refusing to certify work area safe – Board finding bona fide exercise of responsibility as competent person – Employer's disciplinary response breach of Act**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members B.L. Armstrong and F.W. Murray.

**APPEARANCES:** D. Ublansky for the complainant; J.F. Foreman, Q.C., R. Betts and H. Lingley for the respondent.

#### **DECISION OF THE BOARD; April 6, 1982**

##### **I**

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*. The complaint arises because of a disciplinary notice which was placed on Mr. Frangis' personnel file after a dispute with his employer about safety on the work site. The complainant contends that his concerns about safety were raised *bona fide*, and that, in the circumstances, a disciplinary notation was improper. By virtue of section 24(5) of the Act, the onus of proof lies upon the respondent to satisfy the Board that it has not contravened section 24.

2. A hearing to inquire into this matter was conducted on January 26, 1982. Of the many individuals involved in the events which gave rise to this complaint, only the complainant himself, and H.R. Lingley, the respondent's operations superintendent, gave evidence. The Board prefers to rely on this evidence — given viva voce, and subject to cross-examination — rather than the various "memoranda to file" prepared by company officials after the events in question. Moreover, except for Mr. Lingley, none of the individuals who prepared or were mentioned in those memos, gave evidence concerning the version of events or opinions expressed therein. Where the testimony or recollections of Mr. Lingley and Mr. Frangis are in conflict, the Board generally prefers the evidence of the latter.

3. The respondent runs a refinery complex in Sarnia, Ontario. In September 1981, parts of that operation were shut down so that repair and maintenance could be done. Included in this work was the sandblasting of the interior walls of a box-type furnace known as "F-601". F-601 is one of three interconnected furnaces used to heat chemical products as part of the refining process. The three furnaces are not in a building or other enclosed area. All three are outside. Utility lines are directly connected to each of the furnaces, and within about 15 feet, there are other pipelines carrying hazardous materials.

4. Flue gas from the fuel burned in F-601 is conveyed to the atmosphere by duct-work connected to a 250 foot high chimney. The sister furnaces F-602 and F-603 have their own stacks, but these are also linked to the main stack of F-601. Adjacent and connected to F-601, is a waste-heat boiler. Flue gas from the furnace is routed through the waste-heat boiler (which, as its name implies, draws off waste-heat), and then goes into the stack. The furnace measures approximately 75 feet by 25 feet by 40 feet high. The sandblasting crew — employees of a maintenance subcontractor — were to work in this confined space.

5. While the subcontractor's employees were working in F-601, all three furnaces were to be shut down, and all input lines sealed off to prevent the release of dangerous material into the furnace. Gas tests were to be conducted before entry into the furnace, gas alarms had to be installed, and a watchman posted in the vicinity. All of these precautions were necessary because of the variety of hazardous substances in close proximity to F-601. Some of these substances are liquids. Some of them are gases. Some are lighter than air, and would disperse upwards. Others have greater density and could rise, fall, or concentrate, depending upon the ambient air-flow around the furnace.

6. Initially, the company had no intention of blanking off the duct-work to the chimney stack. The plan was to have the Chimney open. The respondent took the view that air-flow would improve ventilation and carry off some of the dust from the sandblasting process which would otherwise build up and reduce visibility. Without ventilation, the sandblasting would have to be interrupted periodically so that the dust could settle. If the stack was open however, it was expected that the sandblasting crew would be able to work continuously and more efficiently.

7. The complainant has been employed by Imperial Oil for about 12 years. For the last 2½ years, he has been working as a process operator. Part of his function (and that of his crew) is to perform the tests and inspections mentioned required by the *Occupational Health and Safety Act* to ensure that his area and its equipment are safe for the maintenance crew to do their work. Mr. Frangis and his group get the furnace physically ready for repair, prepare the connecting lines for blanking, direct the mechanical crew to put in the required blanks, and



issue work permits as required. It is Mr. Frangis who evaluates the situation, records the test results, and pursuant to section 72 of the Regulations, certifies in writing that any confined space in which persons will work (here, F-601) is free from hazard and will remain so.

8. Mr. Frangis issues what the parties referred to as work safety permits which in the case of a confined space operates as a vessel entry permit. Without such work safety permit, the work cannot proceed. It is conceded that the issuance of such permits is an important responsibility. A new work-safety permit must be issued for each piece of work to be done, and such permits are valid only for the shift on which they are issued. During the shutdown, Mr. Frangis himself issued 40 to 60 such permits every day. If the work is not completed by the end of the shift for which the permit is issued, the operator on the next shift must issue a new work-safety permit in accordance with his own judgment of the situation as it then exists.

9. On September 16, the complainant was advised by Roger Barubi, the co-ordinator of the mechanical group, that there was work to be done in furnace F-601. Frangis said that he would check to ensure that all of the lines had been properly blocked off — to which Barubi replied that Frangis should take his word for it. Nevertheless, Frangis proceeded to inspect all three furnaces, which, as we have noted above, were interconnected. There was a lot of checking to do, but Frangis wanted to be careful. He and his crew had smelled fuel gas in the area, but gas testing had not revealed its source. As it turned out, a leak was discovered a few days later, and the people then working in the furnace had to be removed while it was being repaired.

10. On September 16, neither the stack to the atmosphere nor the passage to waste-heat boiler had been blanked off. Frangis thought that blanks should be installed at both locations. In the case of the waste-heat boiler, Frangis wanted to eliminate any possibility that a potentially dangerous material — especially steam — could enter F-601 from that quarter; and it appears that this request was never the subject of any real dispute. Whether or not it was absolutely necessary, the blanking of the waste-heat boiler was subsequently done. Frangis' opinion that the stack should be blanked however, was directly contrary to management's view of how the sandblasting work should proceed. It was their position that sandblasting could only be effectively carried out if the stack was open to the atmosphere. Frangis took the opposite view; and it was his reluctance to issue a work safety permit until the stack was sealed, and his debate with management about the desirability of that step, which ultimately led to the disciplinary notation being placed on his personnel record.

11. Frangis was not concerned about the dust level in the furnace. He had been told (rightly or wrongly) by the foreman of the sandblasting crew that the work could be done safely with or without added ventilation through the stack — although, of course, with the stack open, the sandblasting would be much easier. Frangis' concern was that, with both the stack and furnace door open, the draft that management hoped would carry the dust away, could also suck dangerous vapors from the outside into the confined space where the men were working. Moreover, it was Frangis' understanding of the refinery practice, that when work was to be done inside a furnace, the stack was sealed off. This was what had happened in at least one instance in which he had personally been involved, and it was his belief that this was the normal practice.

12. The Board accepts that Frangis' understanding of refinery practice was honestly held given his own (perhaps limited) experience, and what he had been told by other

employees. The Board therefore accepts that on September 16, Frangis honestly believed that the proposed method of sandblasting appeared to be a deviation from past practice. The Board notes however that there is no direct evidence of the employer's practice one way or the other, or whether it was necessary to vary that practice in the case of sandblasting. Mr. Lingley was not employed on the refinery site in 1979 when a shutdown entailed similar work, and he testified, variously, that he had been told that the general practice was to leave the stacks open, and that both practices has been employed. He told the Board that on September 16, when he discussed the matter with Frangis, he did not think that the past practice was relevant; his main concern was to get the work going. He said that he could not remember what Mr. Frangis' position was on this issue.

13. Frangis' reservations about the proposed work in F-601 were eventually passed along to Ted Wasson, the assistant process operations superintendent, who asked what the problem was and observed that Frangis was holding up work. Frangis told Wasson that he thought the stack and waste-heat boiler should both be sealed off. Sometime later, Wasson phoned back and said that Al McEachen, the mechanical supervisor in charge of the shutdown, would authorize the installation of a metal guillotine blank to segregate the waste-heat boiler, and a plywood blank to seal off the F-601 stack. This was not done immediately, however, and that afternoon, Frangis was called to a meeting to discuss the situation. The focus of that discussion was the necessity of installing a blank in the F-601 stack — although the presence of live lines to the waste-heat boiler and the absence of a blank in that location were also mentioned. No gas monitors had yet been installed, nor had the gas testing been done. Frangis was reluctant to do it. Management treated the situation as an unreasonable refusal to issue a work-safety permit.

14. At the meeting, various management officials — many of whom, it must be noted, had much more experience than the complainant, — attempted to persuade him that it was safe to do the sandblasting without sealing the stack. Frangis outlined the reasons why he thought the stack should be closed and various alternatives were discussed, including using the stack damper to regulate the air-flow. The meeting lasted until the end of Frangis' shift, by which time he remained unpersuaded that the use of the damper would make the job as safe as it could be. His understanding (or misunderstanding) of the company's usual practice had not been clarified. The management personnel did not feel that there was any need to inspect the F-601 site so that Frangis could identify specifically what he thought needed to be done and why; and they felt that there was no need to consult the foreman of the sandblasting crew. Dean McEachen, the safety co-ordinator, assured Frangis that the job was safe; but Frangis was not convinced. McEachen was a laboratory employee who, in Frangis' view, had little experience with this kind of work. McEachen admitted that he did not know the location of the furnace, had not inspected the site, and had never seen or fought a fire. The issue remained unresolved by the end of Frangis' shift. Management officials undertook to solicit the opinion of the Ministry of Labour, and Frangis left expecting that an inspector would visit the site and resolve the issue, one way or the other.

15. When Frangis' replacement came on shift, the respondent decided not to approach him with the problem, although, as we have already mentioned, each operator must exercise his own independent judgment before issuing a work-safety permit for any work to be done during his shift. There is no indication whether this individual would have agreed with Frangis' assessment of the situation or not; nor, as a result, can any impediment to the progress of work during the night shift be attributed solely to Mr. Frangis.



16. The company officials expected a determinative resolution of the safety issue on the evening of September 16, in consultation with an official of the Ministry of Labour. As it turned out, the issue was resolved, — but not quite in the way they had anticipated. The Ministry of Labour official advised that, in his opinion, Mr. Frangis could not refuse to issue a safety permit in the circumstances because, in effect, it was based upon his concern that the employees of *another employer* (i.e. the subcontractor) would be working in conditions that might be unsafe. In the official's view, that kind of refusal to work did not fall within the ambit of the *Occupational Health and Safety Act*. He regarded it as an internal disciplinary matter. That is how the respondent subsequently treated it. Since neither Frangis nor Lingley talked personally to the Ministry official, the Board has before it no direct evidence as to what he was told or how completely the situation was explained to him.

17. It is important to note at this point that, on the evidence, F-601 was not ready for sandblasting during Mr. Frangis' shift on September 16. The pre-entry safety precautions (including blanking the waste-heat boiler which, at Mr. Frangis' request, the respondent had already undertaken to do) had not yet been completed. The debate on the afternoon of September 16, was about whether these steps were sufficient and, whether, when they were completed, a work safety permit should be issued. Mr. Frangis was reluctant to do so until a further step was taken, and his employer thought that this step was unnecessary. While strictly speaking the issue could be considered academic because the sandblasting work for which the permit was needed would not commence during Mr. Frangis' shift on September 16, and each shift involved a new permit based upon a new appraisal of the situation, as a practical matter, Mr. Frangis' expressed intention crystallized a safety-related dispute which the respondent knew would have to be settled. And, until they were advised otherwise by the Ministry of Labour, both parties regarded it as a "refusal to work" which had to be resolved through the process of joint consultation and investigation set out in section 23 of the *Occupational and Safety Act* (see *infra*), with ultimate reference to the Ministry of Labour.

18. On the morning of September 17, Mr. Frangis reported for work as usual and issued permits for various jobs in his work area. As far as he knew, the situation with furnace F-601 was still the same. At about 9:00 a.m., he was called to another meeting and advised that the Ministry of Labour had determined that there was no health and safety issue and that the matter was an internal disciplinary problem. Frangis was a little surprised that the Ministry of Labour would reach this conclusion without visiting the site or investigating the matter; however, he was faced with an ultimatum: either issue a safety permit or "face the consequences". At this point, Mr. Frangis capitulated and concluded that he would issue a safety permit when the waste-heat boiler had been segregated and the required testing completed. Even though he felt that the situation was not as safe as it could be, he was prepared to authorize the sandblasting work without any seal on the F-601 stack. Frangis issued permits for other blanking operations but could not issue a permit for entry into F-601 until the gas testing has been done, and this had not been completed by the end of his shift. On the new shift, a new permit would have to be issued.

19. Frangis' protest apparently had some effect on other employees, even though, as far as he was concerned, the issue had been resolved by the morning of September 17, (albeit not to his complete satisfaction). On and after September 17, Frangis was fully prepared to issue, and did issue, all necessary work permits so that the job could be completed in accordance with the respondent's specifications. He did not follow through with his expressed intention. As a result of these other employee concerns, however, the F-601 stack was sealed off with plywood in



much the same manner as Frangis had earlier requested, and the work proceeded without incident. There were several discussions with officials of the Ministry of Labour some weeks later, but there was no evidence of the substance of those discussions, nor, in our view, are they material to the events of September 16, upon which Mr. Frangis' disciplinary notation is based.

20. On the basis of the evidence adduced before it, the Board finds that, throughout, Mr. Frangis was acting bona fide, out of an honest and sincere attempt to ensure that the work area in which the subcontractor's employees were to work would be, and remain, as free from hazard as possible — the situation which it was his responsibility to certify in writing. No doubt the respondent's officials were equally convinced that the proposal to seal off the stack was unnecessary; but we cannot find that in making this request, the complainant was actuated by any improper motive or desire to impede to progress of work during the shutdown. Nor, on the evidence, can we find that Mr. Frangis' concerns were frivolous or wholly without foundation. Mr. Lingley admitted that the entire area was hazardous, for a variety of reasons, and that this was the reason why elaborate safety precautions had to be taken. The issue was one of degree: whether the potential risk justified sealing off the stack as the respondent eventually did. Mr. Lingley testified that he had never heard of an explosion occurring as a result of a failure to seal off the stack of a furnace; but his evidence on the magnitude and range of potential risks was very sketchy, and, unfortunately, the Board did not have before it the direct evidence of a person such as Ted Wasson, whose experience was acknowledged by both parties. Had an experienced individual testified clearly and specifically that the potential for hazard was minimal or adequately met by existing safety procedures, the Board might well have concluded that the complainant had no reason to enter into a debate with his employer about it, or that he should have been satisfied sooner. However, the Board did not have such evidence, and the evidence that there was indicated: that in at least some circumstances, the respondent has considered it appropriate to seal a furnace stack before work inside it can proceed; that, on September 16, there was an unidentified gas leak in the area which heightened Mr. Frangis' concerns; that the stack was sealed eventually (suggesting that the blanking itself, while perhaps unnecessary, did not, in the respondent's view, increase the hazard); and, that when a gas leak was subsequently discovered, F-601, (by then completely blanked off,) was evacuated while it was being repaired. We conclude therefore that while Mr. Frangis might have been over cautious and wrong in his assessment, he did have some reason to believe that the area and condition of F-601 could pose a hazard for the sandblasting employees working in F-601, and that by reason of his responsibilities in that area, he would be involved if any potential hazard materialized.

## II

21. The question before the Board is whether Mr. Frangis' protest is a protected activity under the *Occupational Health and Safety Act* for which he cannot be disciplined. Several of the provisions of the Act potentially relevant to this matter are as follows:

“1.2 In this Act,...

“competent person” means a person who,

- i. is qualified because of his knowledge, training and experience to organize the work and its performance,
- ii. is familiar with the provisions of this Act and the regulations that apply to the work, and

- iii. has knowledge of any potential or actual danger to health or safety in the work place.

14.(2)(g) Without limiting the strict duty imposed by subsection 1, an employer shall,...

take every precaution reasonable in the circumstances for the protection of a worker.

17.(l) A worker shall,

- (a) work in compliance with the provisions of this Act and the regulations;...

- (b) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows.

18.(l) The owner of a work place that is not a project shall,

- (a) ensure that,...

- (iii) the work place complies with the regulations.

*(Section 23 omitted)...*

24.(l) *No employer or person acting on behalf of an employer shall,*

- (a) dismiss or threaten to dismiss a worker;

- (b) discipline or suspend or threaten to discipline or suspend a worker;

- (c) *impose any penalty upon a worker;*

- (d) intimidate or coerce a worker,

*because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.*

(emphasis added)

*(Balance of section 24 omitted)*

### *Regulations*

72. Subject to section 74, a confined space shall be entered only where,

- (a) there is an easy egress from all accessible parts of the confined space;

- (b) mechanical equipment in the confined space is,
    - (i) disconnected from its power source, and
    - (ii) locked out;
  - (c) all pipes and other supply lines whose contents are likely to create a hazard are blanked off; and
  - (d) the confined space is tested and evaluated by a competent person who,
    - (i) records the results of each test in a permanent record, and
    - (ii) certifies in writing in the permanent record that the confined space,
      - a. is free from hazard, and
      - b. will remain free from hazard while any worker is in the confined space having regard to the nature and duration of the work to be performed.
73. Subject to section 74, a confined space in which there exists or is likely to exist,
- (a) hazardous gas, vapour, dust or fume; or
  - (b) an oxygen content of less than 18 per cent or more than 23 per cent at atmospheric pressure,
- shall be entered only when,
- (c) the requirements of section 72 are complied with;
  - (d) the space is purged and ventilated to provide a safe atmosphere;
  - (e) the measures necessary to maintain a safe atmosphere have been taken;
  - (f) another worker is stationed outside the confined space;
  - (g) suitable arrangements have been made to remove the worker from the confined space should he require assistance; and
  - (h) a person adequately trained in artificial respiration is conveniently available.



## III

22. The origins and purpose of the *Occupational Health and Safety Act* have been fully canvassed in *Inco Metals Co.* [1980] OLRB Rep. July 981. We do not think it is necessary to repeat that analysis here. It suffices to note that the Act is remedial legislation prompted by a Legislative intent to promote safety in the workplace and protect workers from hazardous conditions. It is in that light which it must be approached, and in our view, the Board should not construe the statute so narrowly as to discourage employees from raising bona fide safety concerns with their employer — especially where, as here, it is part of an employee's job function and a statutory responsibility to verify that his work area is free from hazard.

23. The *Occupational Health and Safety Act* creates new rights and imposes important responsibilities on all members of the workplace to ensure that the Act is complied with, and that safety problems are identified and rectified. A worker is required by section 17 to work in accordance with the Act and its regulations, and to report to his employer any contravention of the Act or the regulations, or the existence of any hazard of which he knows. He is prohibited from working in a manner which may endanger himself or other workers. He has a right to refuse unsafe work in the circumstances set out in section 23 and is protected from reprisals under section 24. It must be noted however, that the protections of section 24 extend beyond a refusal to work under section 23. In *Adelaide Building Services* [1980] OLRB Rep. July 933, the Board observed:

“That provision does not, on its face, limit its protection or application to situations where a worker has refused to perform work. The Act itself speaks to matters other than refusal, and, among other things, imposes a variety of obligations upon constructors, employers, supervisors, workers, owners and suppliers (see Part III of the Act). *A worker who is trying to comply with the provisions of this Act by fulfilling his obligations under section 17, or who is trying to seek enforcement of this Act by getting his employer or supervisor to fulfill the obligations set out in section 14, 15 and 16 of the Act, is no less entitled to the protection of section 24(1) than is the person who refuses to perform work.*”

(emphasis added)

It is clear therefore that an employee acting or seeking compliance with the Act, cannot be penalized for so doing.

24. In the instant case, Mr. Frangis' duties are beyond those of an ordinary worker. He is designated by his employer as a “competent person” (see section 1.2 of the Act) whose responsibilities extend to certifying that his work area is safe (see Regulations 72). The importance of those responsibilities cannot be minimized, because the subcontractor and his employees will be totally unaware of the range of potential hazards which they will face on the respondent's workplace. They rely on the respondent and its employees to ensure their safety. That is what Mr. Frangis was trying to do here, and we do not think he can be disciplined for it.

25. As the Ministry of Labour official apparently pointed out, Mr. Frangis' reluctance to issue a work safety permit does not fit easily into section 23(3) of the Act. Not only was his refusal an expression of a future intention (because he could not have issued the disputed permit on September 16 anyway), but also, the casual connection between the issuance of the

permit and the circumstances enumerated in section 23(3)(a)(b) and (c) is somewhat remote. We do not have to resolve this issue however, because in our view, it is inconceivable that the Legislature could ever have intended that a person in Mr. Frangis' position could be disciplined for an honest and bona fide exercise of his responsibilities under section 72 of the Regulation. As the "competent person" designated to satisfy himself and certify to the safety of the workplace, it would be anomalous if the raising of a bona fide safety concern could result in discipline — even if he is wrong in his assessment of the situation. On the contrary, it is our view that such concerns should be raised and resolved with his employer. This does not mean that Mr. Frangis' has a licence for insubordination. If his refusal were frivolous, vexatious or improperly motivated, the Act would not protect him, and in appropriate circumstances, a prolonged debate might well raise a doubt about an employee's motives. Nor does it mean that the designated individual is the last word on safety at the work site. Another competent person could certify the safety of the situation (as could have happened here) and the lack of foundation for a refusal to issue a permit or the inability to comprehend or accept the advice of more experienced persons might well raise doubts as to the individual's competence and could be dealt with accordingly. But in our view, Mr. Frangis was seeking compliance with the Act, and on the evidence his position cannot be characterized as frivolous. A disciplinary response from his employer — and this is how Mr. Lingley characterized it — was uncalled for.

26. In the circumstances, therefore, the Board finds that the respondent has breached section 24 of the Act, and directs that the disciplinary notation be removed from his personnel record.

27. We do not wish to leave this matter without observing that despite the fact that we have sustained the complainant's position, we do not need to find that he was correct in his assessment of the safety requirements, nor is there any reason to doubt the sincerity of the respondent's conviction that the additional precaution recommended by the complainant was, in fact, unnecessary.

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**2095-81-M** United Brotherhood of Carpenters and Joiners of America, Local 1988, Applicant, v. **G. Lavictoire and Brothers Ltd.**, Respondent

Construction Industry Grievance – Practice and Procedure – Two companies named as respondents – Applicant indicating intention to proceed only against one – Deciding to proceed against both part-way through introduction of evidence – Board prepared to deal with complaint only against one subject to applicant's right to proceed separately against other – President of company performing unit work – No violation in absence of specific restriction in collective agreement.

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *B. W. Adams and G. Rees for the applicant; Brian P. Smeenk and Gabrielle Lavictoire for the respondent.*

**DECISION OF THE BOARD;** April 30, 1982

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. The grievance giving rise to these proceedings alleges a violation of the Carpenters' provincial agreement on the part of Ron Engineering and Construction Ltd. ("Ron Engineering"). In referring the grievance to the Board, however, the applicant named as respondents both Ron Engineering and G. Lavictoire and Brothers Ltd. Neither prior to, nor during the hearing did G. Lavictoire and Brothers Ltd. object to being named in the referral.
3. At the commencement of the hearing, counsel for the applicant trade union stated that on the basis of certain information received from the counsel acting on behalf of the two companies, he believed that G. Lavictoire and Brothers Ltd. was responsible for performing the work giving rise to the grievance, and that the union was content to proceed only against G. Lavictoire and Brothers Ltd. Counsel for the applicant added, however, that he was reluctant to formally withdraw the grievance against Ron Engineering until he had actually heard the evidence related to the grievance. Part-way through the introduction of evidence, counsel for the applicant indicated that the facts revealed by the evidence were different from what he had been led to expect. Counsel stated that although he had been advised that the firm of G. Lavictoire and Brothers Ltd. had been retained to do the work in issue, it now appeared that the president of the company, Mr. Gabrielle Lavictoire, may have been personally hired by Ron Engineering to do the work. If this was the case, he submitted, Ron Engineering would have been in violation of the Carpenters' provincial agreement and, accordingly, Ron Engineering should remain a party to these proceedings. At this point, counsel representing both companies objected to having the matter proceed against Ron Engineering in that he had understood prior to the hearing that the applicant would be proceeding only against G. Lavictoire and Brothers Ltd. and, in consequence, he had not come to the hearing prepared to deal with a case against Ron Engineering. In response to a question from the Board, counsel for the two companies indicated that he did not object to having the union's case against Ron Engineering dealt with separately at a later time.
4. In light of the circumstances before it, the Board ruled orally that it was prepared to



deal only with the case against G. Lavictoire and Brothers Ltd., but that this was without prejudice to the right of the union to later refer the grievance against Ron Engineering to the Board for determination. Accordingly, Ron Engineering is hereby formally deleted as a respondent in these proceedings. In addition, although the grievance as drafted refers only to Ron Engineering, for the purpose of these proceedings, we will treat the grievance as if it had alleged a violation of the Carpenters' provincial agreement by G. Lavictoire and Brothers Ltd.

5. The grievance arises out of the construction of a warehouse, primarily made of steel, for Flakt Canada Limited in Smith Falls. Flakt Canada retained the services of Ron Engineering to act as its project manager. Ron Engineering then entered into an arrangement with G. Lavictoire and Brothers Ltd. to perform certain of the carpentry work on the project. It should be noted that this arrangement did not cover either the forming work on the project or the installation of drywall, both of which jobs required the services of a number of carpenters. G. Lavictoire and Brothers Ltd. did seek to obtain the contract for the drywall, but without success. The terms of the arrangement between the two companies were set out in a letter from Ron Engineering to G. Lavictoire and Brothers Ltd. on September 24, 1981. The letter read as follows:

This will confirm our agreement to engage the services of G. Lavictoire [sic] and Brothers Ltd., on behalf of the Owners, Flakt Canada Limited, with respect to the above noted project.

G. Lavictoire and Brothers will provide throughout the duration of this project, and in accordance with our scheduling, all required labour for the installation of the millwork and miscellaneous carpentry.

Your personnel, as engaged on the above project, will be reimbursed in the amount of \$575.00/week plus 21% payroll burden and 3% overhead costs. Also, as agreed, gas expenses for travel from Ottawa to the project site in Smith Falls will be reimbursed at cost.

Please note that Ron Engineering and Construction (Eastern) Ltd. are acting as Project Managers on the construction of the Flakt Canada Warehouse, on behalf of the Owners, Flakt Canada Limited, of Ottawa. Any and all payments, therefore, as noted above, will be forthcoming from the Owners, following our approval of the same.

6. G. Lavictoire and Brothers Ltd. is based in Ottawa. Mr. Gabrielle Lavictoire, the president of the company, testified before the Board. Mr. Lavictoire's testimony indicates that he is responsible for the day to day operations of the firm, including the hiring and firing of employees, as well as the supervision of on-site employees. Mr. Lavictoire testified that although at the relevant time business was very slow, in the past the company has employed up to sixty carpenters at a time.

7. G. Lavictoire and Brothers Ltd. is bound by the terms of the Carpenters' provincial agreement. Mr. Lavictoire is himself a member of the Ottawa local of the United Brotherhood of Carpenters and Joiners of America, namely, Local 93. The applicant local is based in Smith Falls. Mr. Lavictoire indicated that in the past he had performed carpentry work on G. Lavictoire and Brothers Ltd. jobs in Smith Falls, and that when he had done so, he had paid an amount equivalent to local dues to Local 1988. According to Mr. Lavictoire, this arrangement

had been agreed to by himself and Mr. Richard Proctor, the former business representative of Local 1988. Mr. Lavictoire worked on the Flakt Canada Limited project in Smith Falls. When Mr. G. Rees, the current business representative of Local 1988, raised the matter with him, Mr. Lavictoire offered to make payments to Local 1988 in accordance with his prior arrangement with Mr. Proctor. This offer was rejected by Mr. Rees.

8. The evidence led before us establishes that all of the carpentry work performed by G. Lavictoire and Brothers Ltd. on the Flakt Canada job was actually performed by Mr. Gabrielle Lavictoire. Mr. Lavictoire did not obtain a referral slip from Local 1988. It is the contention of the applicant that under the provincial agreement any carpentry work on the project should have been performed by a Smith Falls carpenter belonging to Local 1988, and that in any event, Mr. Lavictoire would have had to obtain a referral slip from the Local before starting work on the project. In support of its position, the applicant relied on the following provisions of the Carpenters' provincial agreement:

#### ARTICLE 5 — UNION SECURITY

5.01(a) The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

(b) Except as modified by the provisions of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

(c) It is understood that, if the Local or District Council is unable to provide the required manpower within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

5.08(a) Except as provided otherwise in the trade appendices an employer may transfer an employee from one geographic area to any job or project in any other geographic area within the Province of Ontario on the following basis:

	Out of Area	L.U.'s or D.C.	Total
First Employee	—	1	1
Next Two Employees	2	—	3
Next Three Employees	—	3	6
Next Employee	1	—	7

Next Two Employees	—	2	9
Next Employee	1	—	10
Next Three Employees	—	3	13
Total	4	9	

(b) The first out of area employee may be a working foreman. The maximum in the above schedule may be increased by such further employees as may be agreed upon between employer and Local Union or District Council having jurisdiction. Before commencing work the member must be given a referral slip.

9. In our view, Article 5.01 has no relevance to these proceedings. Article 5.01 deals with the hiring of employees, and however one might view Mr. Lavictoire's position, it cannot reasonably be said that he was a newly hired employee of G. Lavictoire and Brothers Ltd. Accordingly, the only issue is whether there has been a breach of Article 5.08.

10. Article 5.08 clearly refers to the transferring of "employees" from area to area. Mr. Lavictoire, however, is president of G. Lavictoire and Brothers Ltd., and as such we regard him as a managerial person and not an "employee" of the firm, either for the purposes of the *Labour Relations Act* or for the purposes of the collective agreement. It is now generally accepted that unless specifically restricted from doing so by the collective agreement, managerial persons are free to perform work which would otherwise be performed by bargaining unit employees. See *Re Orenda Ltd. and I.A.M., Lodge 1922*, (1972) 1 L.A.C. (2d) 72 (Lysyk) and *Re 40548 Ontario Ltd. and Retail, Wholesale & Department Store Union, Local 448*, (1980) 28 O.R. (2d) 697. Although both the caulking appendix and the acoustic and drywall appendix to the provincial agreement do place certain limitations on the right of managerial persons to work "with the tools", no such restriction is contained in the provisions of the provincial agreement applicable to G. Lavictoire and Brother Ltd. In particular, there appears to be nothing in the agreement which prevents managerial persons from working on a job in Smith Falls.

11. We recognize that a person classified as managerial may perform bargaining unit work to such an extent as to bring him within the bargaining unit. See *Re Westroc Industries Ltd. and United Cement, Lime and Gypsum Workers, Local 366*, (1973) 5 L.A.C. (2d) 61 (Beatty). We also recognize that Mr. Lavictoire spent all of his time on the Flakt Canada job doing bargaining unit work and that there were no other company employees on the site for him to supervise. Had Mr. Lavictoire been a person of lesser managerial status, we might well have concluded that he should be regarded as an employee in the bargaining unit subject to the provisions of Article 5.08 of the provincial agreement. Given, however, that Mr. Lavictoire is the president of the firm, and as such is presumably its chief executive officer, we are not prepared to regard him as a bargaining unit employee even in the circumstances present here. This being the case, we are of the view that there is nothing in the provincial agreement which prohibited him from working on the Flakt Canada project.

12. Article 5.08(b) of the provincial agreement stipulates that "Before commencing work the (transferred) member must be given a referral slip". Given the context in which this statement is made, particularly in that it immediately follows references to both "the first out of area employee" and the fact that the out of area schedule "may be increased by such further employees as may be agreed upon" (emphasis added), we view the term "member" as it is used



in this Article as a reference to union members who are bargaining unit employees, and not to managerial persons such as Mr. Lavictoire who also happen to be union members. Accordingly, we are unable to conclude that the fact that Mr. Lavictoire did not obtain a referral slip from Local 1988 amounted to a violation of the provincial agreement.

13. We would note that our decision in this matter is based upon the assumption that G. Lavictoire and Brothers Ltd. was a *bona fide* subcontractor on the Flakt Canada job. As indicated above, counsel for the applicant raised the possibility that Mr. Lavictoire was in fact a direct employee of Ron Engineering which, in his view, would have involved a violation of the provincial agreement by Ron Engineering. That is a matter, however, which must await a determination in any proceedings involving Ron Engineering.

14. The grievance insofar as it applies to G. Lavictoire and Brothers Ltd. is dismissed.

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**0581-81-M; 0582-81-M International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. Lewis Insulation Services Inc., (Respondent)**

**Construction Industry Grievance – Whether emergency existed entitling employer to hire off street – Whether emergency employees entitled to first year apprentice status after emergency over – Whether termination of applicant's member violating agreement**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. D. Bell and C. A. Ballentine.

**APPEARANCES:** *S.B.D. Wahl and B. McQueen for the applicant; G. Grossman, B.W. Binning and Ross Lewis for the respondent.*

**DECISION OF VICE-CHAIRMAN D. E. FRANKS AND BOARD MEMBER J. D. BELL; April 29, 1982**

1. These two cases result from two grievances which were referred to the Ontario Labour Relations Board for arbitration pursuant to section 124 of the *Labour Relations Act*. They arise out of three different alleged violations of a collective agreement by the respondent, Lewis Insulations Services Inc. (hereinafter referred to as Lewis) in Windsor. Although the grievances are separate and allege different violations, because they are part of one stream of things, for convenience the Board consolidated the two proceedings.

***THE FACTS — BACKGROUND AND OVERVIEW OF EVENTS***

The three alleged violations being grieved relate to,

(a) the emergency clause in the collective agreement and how it works;

- (b) the hiring of first year apprentices under the collective agreement;
- (c) the lay-off of a job steward.

These are extremely complex issues which raise difficult problems of the interpretation of the collective agreement between the parties. In order to understand these issues it is necessary to put them in context. Accordingly, before dealing specifically with each of the three issues we will first set out some of the background and an overview of the events which gave rise to these proceedings.

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3. The events which give rise to the present grievances go back to the fall of 1980. The applicant trade union had engaged in a lengthy strike during the summer of 1980. As a consequence of this strike the respondent Lewis had an extensive backlog of work throughout the Province but specifically in the Windsor area. Indeed, not only had the work backed up as a consequence of the strike, in some cases the work had become more complicated because other construction work had gone on during the strike and materials had to be fitted around the other works. The respondent thus needed a large supply of insulators, particularly in regard to a series of jobs at the extension to the GM plant on Walker Road in Windsor.

4. The respondent requested such men of the trade union. Presumably sufficient numbers of tradesmen were not referred and as a consequence the respondent declared an "emergency". This was done by sending the following telegram to the applicant trade union:

"REF — CLAUSE 2:04 OF THE COLLECTIVE AGREEMENT CONFIRMING THAT YOU HAVE NOT SUPPLIED UNION MEMBERS TO US AS PREVIOUSLY REQUESTED FOR VARIOUS JOBSITES, WE HAVE NO CHOICE BUT TO HIRE EMERGENCY EMPLOYEES AS ALLOWED UNDER THE COLLECTIVE AGREEMENT. PLEASE ADVISE IF AND WHEN YOU HAVE COMPETENT AND QUALIFIED MEMBERS AVAILABLE TO WORK FOR US, AND WE WILL INSTRUCTION [sic] YOU WHERE TO DIRECT THEM."

To understand the concept of "emergency employees" reference must be had to the collective agreement in force between the parties:

#### "ARTICLE II — HIRING

##### 2.01 (a)

The employers shall employ as employees members of the Union in good standing in the performance of all work coming within the scope of this Agreement and shall continue in their employ only employees who are in good standing with the Union.

##### 2.01 (b)

All such employees shall be hired through the Union Office except as hereinafter provided.

## 2.01 (c)

The Union shall issue to the Employer a copy of the referral slip issued to the employee for all employees upon hiring, without delay.

## 2.02

The Union agrees to give preference to and furnish the most competent available employees to the employers on request, provided however, that the employer shall have the right to determine the competence and qualifications of its employees, and to discharge or refuse to employ, in his sole discretion, any employee for any just and sufficient cause. The employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.

## 2.03

No apprentice shall execute work unaccompanied by a mechanic except that a fourth year apprentice may execute work on a temporary (not to exceed one (1) working day) emergency basis only when a mechanic is not readily available and the Union business office is notified. Employers shall have the right to take apprentices already in their employ to out of town locations.

The following Shop Ratio Table notwithstanding, the ratio of apprentices on a job shall not exceed one apprentice to one mechanic except as provided for in Clause 2.04.

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## 2.04

The employers shall have the right to procure workmen from available sources other than from the Union on jobs located within the local jurisdiction when the Union has failed to furnish the required number of competent and qualified employees within two (2) working days following a written request by an employer. Immediately upon hiring, such workmen shall be considered to be emergency help. The employer, after consultation with the Union Business Manager, shall designate the classification within which such emergency help falls, and they shall be entitled to receive hourly rates of pay applicable to such classification. Emergency help shall be issued referral cards for identification and classification only, but shall not come within the scope of this Agreement except as noted in Clause 9.01, and shall be replaced as soon as competent Union employees are available. Emergency help shall not be counted in the ratio for the duration of the emergency.

## 2.05

An emergency shall be defined as, and shall be deemed to exist, where there is a job situation in which the Union is unable to provide qualified members of the Union on a written request by an employer. If there is any disagreement between the parties concerned as to whether or not an emergency does or does not exist, Article VI will apply.



## 2.05 (a)

An emergency need not be declared to hire new first year apprentices providing the employers shop ratio is in order with Clause 2.03. The Union shall provide these new apprentices with a regular work permit, and without delay.

An emergency can only be declared by an employer and it must be in writing or by telegram.

## 2.06

It is agreed that members of the Union shall not refuse to work on the grounds that the employer has hired non-union workmen, provided that the provisions of Clause 2.04 have been met by the employer.

## 2.07

If an employee has been discharged for cause, the reason for discharge shall be in writing to the Union within seven (7) days of such discharge. Following such notification the employer shall not be required to re-employ this worker. On receipt of such notice by the Union, the Union or the employee may lodge a grievance on the part of the employee which may be processed through the Grievance Procedure provided for in this Agreement, and for this purpose the date when the grievance arose shall be considered to be the date of the receipt by the Union of such notice.

## 2.07 (a)

Union and Association shall be notified in writing of all discharges within seven (7) days of such discharge and state reason for discharge.

## 2.08

The Union hereby agrees that it will not transfer an employee from one employer to another without the permission of the employer for whom the employee is working at the time.

The employer hereby agrees that it will not transfer an employee from one employer to another without the permission of the Union.

## 2.09

A member of the Union shall not work at the trade for himself or any other person or shop in the performance of his job as an Asbestos Worker, until he has secured a written referral clearance from both the Union and employer, which must be produced on request.

## 2.10

The Union and employer will cooperate in placing, on suitable projects, certain senior members of the Union."

Although much of the present case centres around the interpretation to be given this clause, from even a superficial reading it can be seen that the declaring of an emergency relieves against the effect of the closed shop provision of the collective agreement. Once the employer

declares the emergency he is then entitled to hire “off the street”, that is, obtain employees from wherever he can.

5. Having declared the emergency, Lewis then proceeded to hire a number of emergency employees. In accordance with the collective agreement, Lewis requested the Union to issue permits to these emergency employees. No such permits were sent from the union for these employees. In practice there are a number of types of permits issued by the applicant trade union. Whenever a journeyman is dispatched to a job site a permit is issued. When an emergency employee is hired, the practice is for the permits to be sent to the employer as a matter of course. Such permits are then recorded in a specific book for emergency help at the union office. However, in this case, at no time from the original request on, and notwithstanding subsequent requests, did the trade union issue permits for the employees in question.

6. While this emergency situation was continuing for the Lewis operation in Windsor there was a change in leadership of the local union. The evidence of the union’s dispatcher is that during this period both Mr. Duffy and Mr. McQueen, his successor as business manager, told her “not to worry” about referrals to the Lewis job sites in Windsor. She apparently didn’t heed either instruction and it appears that there were referrals to the Windsor job sites. There is one other piece of evidence by the dispatcher that is worth noting at this point since it forms part of the general background to this dispute. It is clear from her evidence, that in referring mechanics to job sites, as dispatcher she would go down the out-of-work list in the hiring hall and phone up the various out-of-work members when a job became available. However, *they could refuse to go to such a job* and furthermore the rules of the hiring hall do not impose any penalty for refusing a succession of such referrals. In other words the function of the hiring hall with respect to the members of the applicant is simply to inform them of jobs that are available. The union, through the hiring hall cannot effectively *direct* its members to go to any job.

7. The present dispute between the parties started in mid-February. At about this time there were a series of conversations between Mr. McQueen, business manager of the applicant, and Mr. Flynn, the manager of the Lewis operation in Windsor. The conversations were obviously heated conversations. What is clear from the evidence, however, is that McQueen told Flynn that the union now had unemployed mechanics and they would send them to Windsor. Flynn, on the other hand, took the position that this was rather pointless, since the Windsor jobs, in particular the GM job which was the largest, was closing down or decreasing in work and Lewis would be laying off people in the near future. Flynn, for his part, insisted that the permits be sent for the emergency men. The outcome of these conversations was that the applicant trade union sent Flynn a telegram as follows:

“YOU ARE EMPLOYING EMERGENCY MEN WHILE WE HAVE UNEMPLOYED MEMBERS. EMERGENCY MEN MUST BE DISCHARGED AND REPLACED WITH LOCAL 95 MEMBERS THE UNION IS READY AND WILLING TO SUPPLY AS PER ARTICLE 2.04 COLLECTIVE AGREEMENT. EMERGENCY HELP SHALL BE REPLACED AS SOON AS UNION EMPLOYEES ARE AVAILABLE.”

The effect of this telegram was that the battle lines were drawn between Lewis and the applicant trade union. Lewis took the position that certain emergency persons were entitled to

the status of first year apprentice and that permits should be sent to Lewis classifying them as first year apprentices. The trade union took the position that the emergency was over and that Lewis ought to lay off everyone not working on a permit, that is all emergency men, and accept journeymen referred by the union. However, there is no evidence of any mechanics showing up at the Lewis job site in Windsor and being refused work by Lewis. Further, the evidence is clear that shortly after the telegram, the Lewis forces in Windsor decreased and a number of emergency employees were laid off.

8. Lewis, however, retained some dozen of the emergency employees claiming that they were first year apprentices. Mr. Flynn, in explaining this, was quite candid. Of the group of emergency help that had been hired by Lewis in the fall of 1980, the employees which were retained by Lewis as first year apprentices were the best of this group as employees. It is also clear, on the evidence that within a week or so of the telephone conversations and the telegram, Lewis was within the ratio of apprentices to journeymen set out in the collective agreement, provided Lewis was indeed entitled to designate the employees in question as first year apprentices.

9. Events continued in this fashion for a while. There was a pattern of increased lay-offs as Lewis completed the GM job, and indeed, over time a number of the first year apprentices were laid off as the work load decreased and the number of allowable apprentices decreased. Throughout this time, Flynn asked various representatives of the applicant trade union (the area steward and certain job stewards) whether the permits for the first year apprentices would be forthcoming.

10. During the month of May, there was a meeting of the Windsor area insulators in which the status of the first year apprentices working without permits was raised by the members. It appears that the members working on the Lewis job site were concerned about the fact that the apprentices in question did not have permits and they were subject to discipline under the union constitution and by-laws for working alongside insulators not under permit from the local. In this regard, the evidence is quite clear that Mr. McQueen indicated to the members that he would not issue such permits but also indicated that he would not charge the employees for working with such persons. The meeting in question involved the replacement of the area steward who had apparently been requesting such permits from the Toronto head office of the union. It appears that after this meeting a Mr. Clark was appointed a job steward by Mr. McQueen on the GM site. Mr. Clark was laid off and his lay-off is the subject matter of one of the two grievances. We shall deal with that very specific dispute later.

11. At the very core of this dispute is a complete divergence of the views about the use and economics of emergency help and apprentices. The evidence given by Mr. Ross Lewis, the employer, is that the usefulness of untrained employees is limited. Thus, when emergency employees are hired "off the street" they can only be used to carry materials and to clean up on the job site. In such a function, it was his estimate that about three such unskilled persons could keep ten mechanics supplied. Clearly, on the other hand, Mr. Lewis would just as soon not pay a mechanic to carry material. On the other hand, Mr. McQueen, the business manager of the applicant, clearly feels that the process of hiring emergency help is open to extreme abuse as a source of "cheap labour" whereas Lewis's view was that he couldn't make money off cheap labour since they simply could not do the work of a fully trained mechanic.

12. Concerning apprenticeship, however, neither Mr. Lewis nor Mr. Flynn appear very



interested in the formalized apprenticeship program being administered by the Joint Apprenticeship Committee. This committee, referred to as the JAC, controls entrance into the second year of apprenticeship and thus ultimately controls the apprenticeship program. Mr. McQueen is clearly concerned that, if Mr. Lewis can choose the first year apprentices, this, in effect, gives the employer the first screening of entrance into the apprenticeship program. Mr. Lewis, on the other hand, was frequently quite bitter about the refusal of the union to take people that he thought qualified, into the "union's" apprenticeship program. It is in the context of these complex problems that these grievances were argued. It would surprise no one, therefore, that the hearing was long and at times bitter.

#### PART ONE OF THE GRIEVANCE — THE END OF THE EMERGENCY:

13. As noted above, Lewis had declared an emergency sometime in October of 1981. The end of the emergency came with a series of telephone conversations between Mr. Flynn and Mr. McQueen in February which resulted in a telegram being sent by McQueen to the Lewis Windsor office. We turn now to examine the end of the emergency in some detail.

14. The evidence of Mr. Flynn is that sometime about mid-February he was contacted by Mrs. Bradley, the dispatcher in the union office, to the effect that the union had men available and were prepared to start sending them. Mr. Flynn's reply was that the Lewis operation was starting to lay-off men. This was followed shortly thereafter by a phone call from Mr. McQueen. McQueen demanded that Lewis take some more men or get rid of the emergency people. McQueen was informed by Flynn that they were ready to lay-off people, and McQueen said he would look into it. There followed another conversation several days later which turned into a bad argument. In this conversation McQueen demanded that Flynn lay-off all of the emergency help. Flynn, in turn told McQueen that he wanted permits for seven of the people that he had. That is, first year apprenticeship permits. The conversation got heated and McQueen threatened Flynn with a grievance whereupon Flynn hung up.

15. The telephone call was followed by the telegram recounted above (paragraph 7) stating that the union was ready and willing to supply men, and that emergency help shall be replaced as soon as union employees are available.

16. The first question raised in this matter is what was the effect of this telegram. The applicant takes the position that the telegram clearly ended the emergency. We cannot accept this proposition. The telegram may have told the respondent that men were available, but the telegram does not in and of itself supply men nor does it indicate that the union can supply men. As we have noted, the evidence is that the union, through its hiring hall, has no way of assigning tradesmen to a particular job and penalizing them if they refuse to go. In the context of evidence which indicates that the union was having trouble getting men to go from other areas to work in Windsor, it is doubtful that the telegram can be taken as anything more than the intention by the union to try and supply men. The emergency would only be truly over if Lewis had been informed by the union that persons X, Y, or Z were reporting to the Lewis operation in Windsor on a certain day. Clearly, under the collective agreement, at that time, Lewis would then be required to terminate the employment of emergency help and hire the members sent from the union hiring hall. That, however, is not the case here and there is no evidence that any members were sent to Lewis subsequent to or as a result of the February telegram.

17. Even if we were to take the telegram as ending the emergency, in the particular circumstances of this case, we would not find a violation of the collective agreement. Counsel for the applicant argued that 48 hours after receipt of the telegram that the employer should have laid off emergency people. The 48 hours he argues comes from the very definition of emergency set out in clause 2.04 which sets out the condition where the union has been unable to furnish the required number of competent and qualified employees within two working days following a request by the employer. The applicant thus argues that this two day period is a reasonable amount of time for the employer to arrange his affairs. This places an interpretation on the whole of Article II which we cannot accept. The employer's position under this article is not simply that of two working days without sufficient tradesmen to man a job, but must allow for the recruitment of the emergency help. Thus, the position by Lewis that they were about to lay-off employees and that they should be entitled to retain the emergency until the lay-off in the immediate future is in our view a valid position. In fact, by the payroll period ending March 2nd, Lewis laid off a number of employees including all of the emergency employees except those which form the second part of the grievance. In these circumstances, therefore, we are of the view that any grievance by the union over the continued employment of emergency help in such circumstances must fail. The employer, in our view, complied with the collective agreement within a reasonable time in the circumstances.

## PART TWO — THE HIRING OF FIRST YEAR APPRENTICES:

18. In implementing the lay-off in early March, Lewis took the position that seven of the employees who had originally been hired as emergency help were now employed as first year apprentices pursuant to clause 2.05(a) of the collective agreement which reads as follows:

“An emergency need not be declared to hire new first year apprentices providing the employers shop ratio is in order with Clause 2.03. The Union shall provide these new apprentices with a regular work permit, and without delay.

An emergency can only be declared by an employer and it must be in writing or by telegram.”

Clearly, at this point Lewis assumed that the emergency was over, whether it had been affected by the telegram or not, and indeed, Lewis terminated all but seven of the emergency crew. Flynn, in his evidence was quite candid that, of the bunch, these were the best employees and he felt that they deserved to be given a chance to become members of the union. Thus, Lewis purporting to act under 2.05(a) retained seven people as first year apprentices but otherwise as required by the clause his ratio of apprentices to journeymen was in order. However, Flynn did admit that he also terminated some senior apprentices in order to retain the seven people in question. It is this group of seven which forms the second part of the grievance.

19. There is no need to go into the details of the employment of the seven people in question. It is enough to say at this point that Flynn continued to ask for permits which were denied. Their employment continued with Lewis for varying amounts of time. From March to June Lewis was winding down the work on the GM job and from time to time the various apprentices were laid off so that Lewis effectively remained within the ratio as required by clause 2.03 of the agreement.

20. Both Flynn and Lewis were quite concerned that no permits were sent as required by 2.05(a). However, they did not file a grievance requesting such permits, which presumably they were entitled to do under the collective agreement. As noted above, in the outline of events, this did cause some problems with the members of Local 95 working in Windsor, since they were quite conscious of the penalty under the union by-laws for working next to employees not under permit from the union.

21. At issue in this part of the grievance is the conflict inherent in Article II of the collective agreement between clause 2.01 and 2.05(a). Clause 2.01 provides for a union security provision typical in the construction industry, namely, that of the closed shop. Thus, the employer is required to employ only members and employ them through the union hiring hall. As is typical in arguments over the interpretation of specific language, counsel for both sides offered the Board a veritable pastry tray of the canons of interpretation of documents. Counsel for the applicant argued that 2.05(a) must be read in light of Article II as a whole which is essentially the union security clause, and that therefore the employer is required to hire first year apprentices through the union. The respondent argued that 2.05(a) means exactly what it says and that reserves specifically the right to the employer to hire new first year apprentices. Further, that the interpretation urged by the applicant would render this provision meaningless.

22. We are of the view that the clause entitles the employer to hire new first year apprentices, since any other interpretation would render that clause meaningless. Of particular note, is the fact that the clause talks of *new* first year apprentices and we interpret the "new" as referring to people who are not already first year apprentices. This is precisely the situation with the seven "emergency help" employees which Lewis continued to employ as first year apprentices. They were not apprentices before, but Lewis under that provision was entitled to hire them as first year apprentices, and further, he was entitled to do that even after the emergency was over.

### PART THREE — THE TERMINATION OF EMPLOYMENT OF THE JOB STEWARD:

23. Mr. Brian Clark is a mechanic insulator who is a member of Local 95. He was referred to the Lewis operation in Windsor in October of 1980 where he worked on a number of projects. Eventually he was working on the GM transmission plant project in Windsor in March of 1981. He was appointed a job steward by Mr. McQueen on May 11, 1981. He was terminated from employment on June 4, 1981.

24. The Union claims that the employer violated clause 7.01 of the agreement in terminating Mr. Clark. 7.01 reads as follows:

"It shall be the right of the Union Business Manager to appoint a Steward for each job from the employer's personnel on the job site.

A job steward shall be recognized on the job and shall not be discriminated against. He shall be allowed reasonable time to check out reported grievances after informing the employer and/or his representative.



The Union shall be notified by the employer prior to any layoff or transfer of a Job Steward. Where practical, a Job Steward shall be one of the last six men on the job."

The respondent argues that the phrase "last six men on the job" refers to particular purchase orders which form part of the overall contract for the job. That is, for the *particular* purchase order that Mr. Clark was working on, at the time he was terminated, that purchase order was finished. The union argues that the term "job" does not refer to a specific commercial contract between Lewis and the purchaser of the construction, but rather the job should be interpreted as the overall GM job site.

25. We are of the view that the employer did violate section 7.01 in terminating Mr. Clark's employment. There were clearly more than six men on the whole of the GM job. Notwithstanding Mr. Lewis's concern about job steward roving from one area of the job to the other, their security of employment cannot be confined to particular purchase orders in the circumstances where there are still a large number of tradesmen on the project. To do so would render the clause meaningless as a device for the union to protect stewards on a project. On this ground, therefore, the grievance succeeds. The parties can work out the details of compensation for Mr. Clark's loss of employment. If the parties are unable to agree on this we remain seized of this aspect of the grievance in the event that they are unable to agree.

26. In summary, the grievance as it relates to part one, the termination of the emergency and part two, the hiring of the first year apprentices, is dismissed. With respect to the violation of a steward's clause the union succeeds.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I disagree with the majority decision as it applies to parts one and two of the grievance. It is my position that the "emergency" officially came to an end in February, 1981, when the union advised the company's Windsor office by telegram (contents appear in paragraph 7 of the majority decision).

2. Mr. Flynn, the company's representative in Windsor, admitted in his evidence that the union had the right to declare the emergency at an end, and that the telegram signified that. However, his reason for not complying with the request of Mr. McQueen, the union's business manager, was that they were at a standoff.

3. Mr. Flynn's arbitrariness extended to the discharging of three "senior established apprentices" while retaining three "emergency workers", which he was insisting should be given status as "first year apprentices". This incident occurred as late as June, 1981, at least three clear months after he had received the telegram from the union.

4. Mr. Flynn showed contempt for the "Apprenticeship Standards"; he stated that he was not a great believer in the set-up, and had not paid any attention to the "Standards' Document". The act of laying off the "established apprentices" while retaining the "emergency workers" is clearly a violation of Article XVIII (Apprenticeship Training) of the collective agreement, and is contrary to section 15a of the Apprenticeship Standards' document which reads as follows:

“15a. *Layoff* — Subject to shop ratio, an apprentice will be the last non-mechanic to be laid off.”

5. Although the collective agreement is unclear and confusing as it relates to an emergency situation and the hiring of new first year apprentices, I cannot accept the interpretation that the company is at liberty to lay off established apprentices and then be in a position to engage new first year apprentices in accordance with the shop ratio. This type of manipulation would render the Apprenticeship Standards meaningless.

6. It is my position that the company violated the collective agreement. The grievance as it relates to parts one and two should not have been dismissed.

## **2137-81-U United Steelworkers of America, Complainant, v. Rheem Canada Inc., Respondent**

**Change in Working Conditions – Discharge for Union Activity – Unfair Labour Practice – Grievor having access to confidential information suspected of leaking information – Employer concerned about possible inclusion of grievor in bargaining unit – Removing confidential functions from her – Grievor submitting letter of resignation – Subsequently alleging forced to quit by alteration of duties – Whether grievor dealt with contrary to Act – Board finding no violation**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *J. de Klerk and P. Hand for the complainant; D. Hersey and G. Norman for the respondent.*

### **DECISION OF THE BOARD; April 2, 1982**

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the grievor, Pat Hand, has been dealt with contrary to the provisions of section 66(a) of the Act. The complainant also alleges a violation of section 79(1) of the Act.

2. Ms. Hand's employment with the respondent came to an end on January 6, 1982, shortly after the complainant trade union had been certified to represent employees of the respondent's office in which Ms. Hand worked. Ms. Hand was never discharged, but rather, tendered her resignation on the day in question. It is the position of the complainant and Ms. Hand, however, that Ms. Hand was forced to quit because of the improper actions of the respondent; specifically, the alteration of her duties and responsibilities.

3. Ms. Hand was hired in May of 1980 as an accounts receivable clerk, a position for which she had previous experience. Eventually she was asked to take over the tasks of preparing the bi-weekly payroll for both the hourly-rated and salaried employees of the respondent, together with various incidental functions such as signing up new salaried employees for the respondent's health and welfare coverage. The respondent has had a

relationship with the complainant trade union for a number of years in its Hamilton plant, and in the fall and winter of 1981 was in the process of conducting the negotiations for that plant. One of the complainant's proposals at the bargaining table was to move the regular payday from Friday to Thursday in the week. The company was concerned that it could not meet the Thursday deadline on a consistent basis, and accordingly refused the proposal. In response to this refusal, the union negotiators put forward detailed information as to when in the week the payroll was actually prepared, and when it arrived at each location. The company negotiator and plant manager, Mr. Peron, was taken aback by the apparent extent of the union's knowledge, since much of this information was what Mr. Peron had always regarded as "insider". The matter raised in his mind the question of a possible "leak" from within the respondent's offices at Oakville, and he accordingly passed the incident along to the Divisional manager at Oakville, Mr. Norman. He also mentioned to Mr. Norman a second concern which he had, and that was that one of his foremen had come to him to complain that another foreman had somehow gained knowledge of the first foreman's salary level.

4. The complainant trade union was at this time conducting its organizing campaign amongst the respondent's office staff, and Mr. Peron indicates that there was general speculation as to which employees were supporting the union. He acknowledged further that he thought Pat Hand's name did come up at one point, but not necessarily from Mr. Norman. He was, however, advised by Mr. Norman after the possible "leaks" were discussed that Mr. Norman was thinking about removing the salaried-payroll function from Ms. Hand. The respondent's main concern was that the 1982 salaried increase was about to be implemented only for those employees who would not be in the new clerical bargaining unit, and the respondent was anxious that the percentage increase not be disclosed to the complainant. Mr. Peron's discussions with Mr. Norman took place before Christmas and Mr. Peron testified that no firm decision had yet been made by Mr. Norman.

5. Mr. Norman testified that in addition to the two incidents mentioned to him by Mr. Peron, he had grown concerned about Ms. Hand's possible lack of discretion when it was indicated to him that she had already been discussing the proposed salary increase with other members of the office staff. Those discussions were not encouraged by Ms. Hand, and she did not in fact impart any knowledge, but Mr. Norman was not made aware of that at the time. Finally, it had appeared during the complainant's campaign that someone had received a list of the addresses and telephone numbers of the various employees in the office, and that was a list which was only in the possession of Ms. Hand and Mr. Norman himself. Complicating the situation was the fact that the complainant at the office certification hearing had contested the respondent's request for the exclusion of Ms. Hand, as well as Mr. Norman's own secretary, and the resolution of that matter was still pending before the Board. After consulting with the respondent's head office in New York and with counsel in Toronto, Mr. Norman decided to take the step of temporarily relieving Pat Hand of the salaried-payroll responsibility only, and on January 4th asked to see Ms. Hand in his office. According to Ms. Hand, Mr. Norman said to her that starting the next day he would like her to show Jean Mackenzie (his own secretary) how to do the salaried payroll. Ms. Hand asked "why?". Mr. Norman explained that the "union thing" was up in the air, and that the company was sure that his own secretary, Jean Mackenzie, would not be eligible for the union, but they were not sure about what the result on Ms. Hand would be. Mr. Norman stated that they therefore felt that it would be best if Ms. Hand did not have access to confidential information at that time. Mr. Norman testified that Ms. Hand "seemed to take it well", and that he was relieved that the matter appeared to be over.



6. Ms. Hand then went in to see her immediate supervisor, the respondent's accountant Mr. Diciccio. From his testimony it is evident that Mr. Diciccio himself had very little involvement in the managerial discussions concerning the union and the possibility of a "leak", nor did he appear experienced in matters of this kind. Ms. Hand testified that she told Mr. Diciccio, with whom she had always had a close relationship, what Mr. Norman had just demanded of her, and Mr. Diciccio responded: "I'm surprised he's pulling something like this at this time". Ms. Hand thought for a moment and then asked Mr. Diciccio what would happen if it were determined that she was in fact not eligible for the union. Mr. Diciccio suggested that she ask Mr. Norman's office and asked what would happen if she were ruled ineligible for the union. According to Ms. Hand, Mr. Norman replied, "very hesitantly", that he would give her the salaried payroll back. Ms. Hand responded that she did not think it was fair, and left.

7. Ms. Hand testified that she was so upset that she was up all night and called in sick the next day. Mr. Diciccio called her later in the day, and asked her if there was anything that had to be done with the hourly payroll in case she was not in "on Wednesday, or...". Ms. Hand added, "What, quit?". Ms. Hand later telephoned the respondent's keypunch operator, who receives the hourly payroll, and asked her what work had been done. After that was discussed, the keypunch operator indicated that she was confused as to what was going on, because she had just heard from the supervisor (incorrectly, it turns out) that the *salaried* payroll would be crossing her desk now.

8. Ms. Hand, by her own evidence, was angry and hurt that the company could actually suspect her of leaking information to the union, and the next day telephoned the receptionist at the office and asked her to type up a letter of resignation. The receptionist told her to "hang on" and Ms. Hand said that she couldn't. Ms. Hand then went to the office and signed two copies of her resignation. She went to see Mr. Diciccio first and gave him one copy. Mr. Diciccio urged her to think it over, but Ms. Hand said that Mr. Norman was forcing her. She added that she knew it had something to do with the union, and Mr. Diciccio acknowledged that Mr. Norman did think she was heavily involved. He asked her if she wanted him to go with her to see Mr. Norman, and she said that she did. The two of them then went into Mr. Norman's office, and Ms. Hand gave Mr. Norman the letter. Mr. Norman read the letter, and then simply said: "Okay". Ms. Hand then stated that she was not the person responsible for bringing the union into the office, and proceeded to name the individuals who were. She indicated to Mr. Norman that she knew he felt she had given the list of salaried names to the union, because she and Mr. Norman were the only ones who had access to it. Mr. Norman apparently replied: "What else could I think?", and Ms. Hand states that she replied: "I don't blame you a bit, because I would have thought the same thing had I been in your position". She went on to say to Mr. Norman that she was going to tell him that she had been approached by the union, but then decided that she did not want to get involved in these union matters. Ms. Hand testified that Mr. Norman commented to that, off the record, "if you people would just learn to stand up for yourselves, these things wouldn't happen". She testified that Mr. Norman said that there was nothing else he could do now, and Ms. Hand said: "Yes there is, you don't have to accept my resignation". Mr. Norman replied: "No, I think I'll let it be". Arrangements were then made for Ms. Hand to receive her final papers from the respondent. Ms. Hand went with Mr. Diciccio into his office, and said: "See, I told you he wanted me to quit". She says Mr. Diciccio responded: "Yes, he did, Pat".

9. For his part, Mr. Norman in his testimony readily acknowledged that he believed that Ms. Hand more likely than not supported the union, but stated that his concern was her

potential inclusion in the bargaining unit. He stated that on the basis of the accumulation of incidents surrounding Ms. Hand, he had come to have doubts about her discretion, and was not satisfied that she could “handle it” if placed in a position of conflict within the bargaining unit. The respondent’s evidence is that the salaried-payroll function occupied not more than one to two days per month of Ms. Hand’s time, and that the temporary assignment of that work would not be regarded by anyone as a demotion. Mr. Norman testified that he was surprised that Ms. Hand took the action that she did, in the light of this, but added that he had a problem that he was wrestling with, i.e., what to do with Ms. Hand in the face of the indications of a “leak”, and that when Ms. Hand decided on her own to resign, she was in fact solving a difficult problem for him. He was not, therefore, prepared to reject her letter of resignation once she had submitted it.

10. As noted, the complainant alleges a violation of both section 66(a) and 79(1). Those sections provide:

66. No employer, employer’s organization or person acting on behalf of an employer or an employer’s organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

The complainant does not argue that section 79(1) prevents an employer, acting *bona fides*, from temporarily removing sensitive information from an employee while the union is disputing the employee's exclusion from the unit. Rather, the complainant in this case relies upon the same argument for both section 66 and 79: that the employer has not acted in good faith for strictly business reasons, but rather has been improperly influenced in its decision to alter Ms. Hand's responsibilities by its perception of her as a union supporter. The complainant argues that the respondent's concern was personal to the grievor, based on the belief that the grievor was someone who favoured the complainant's acquisition of bargaining rights, and not solely on the basis of the grievor's position and the issue over exclusion which surrounded it.

11. Having carefully listened to and reviewed the evidence, and particularly that of Ms. Hand herself, the Board does not accept the complainant's characterization of the respondent's motive. Based on the various incidents coming to his attention, Mr. Norman had legitimate grounds for suspecting that someone within his office was leaking confidential information to the complainant, and the Board finds his immediate concern to be credible, in the face of the pending salary increase and office negotiations. The Board finds that Mr. Norman took the action that he did solely as a method of dealing with that concern, and for no other reason. Ms. Hand put the proportion of her time spent on her salaried-payroll and welfare coverage functions at 25% but went on to concede that it could be as low as 10% in some months, and that she sometimes completed the salaried payroll itself within a couple of days, in order that it could be mailed on time to the company's salesmen in Vancouver. Had the adjustment in her responsibilities been intended, as the complainant argues, to cause Ms. Hand to quit, the Board believes that Mr. Norman's spontaneous response to Ms. Hand, when asked what would happen if she were found to be not eligible for the union, would have been considerably different. It is not surprising that Mr. Norman answered "hesitatingly", having been caught unaware by this question, and having been in consultation with both his head office and his counsel up to this point, but Ms. Hand's own evidence is that Mr. Norman did state unequivocally that in that event, she would get the salaried payroll back. Had Mr. Norman's whole course of action been directed towards securing Ms. Hand's resignation, the Board feels that his answer to Ms. Hand at that point would have been at the very least equivocal, so as not to offer Ms. Hand any cause for reassurance.

12. The Board finds that Ms. Hand did in fact act of her own volition in deciding to resign from her employment. She is obviously an individual of great pride, and appears to have overreacted to the doubting of her integrity, beyond what might reasonably have been expected in the circumstances. The difficulty which Mr. Norman was wrestling with has in fact been acknowledged by the Legislature in enacting in section 1(3)(b) of the *Labour Relations Act* the exclusion for persons employed in a confidential capacity in matters relating to labour relations. This exclusion has nothing to do with the integrity of a particular employee; rather, it is a recognition by the Legislature that an employee ought not to be placed in a position where her loyalty to her employer is in conflict with her loyalty to fellow members of a bargaining unit. Beyond this, the respondent in this case did have certain doubts about the discretion of Ms. Hand in particular, as a result of her access to the various kinds of information apparently being leaked, but Ms. Hand herself acknowledged that, at least with respect to the list of employees, she would have thought the same thing had she been in the employer's position. Ms. Hand acknowledged to her counsel, in fact, that if she had it all to do over again, she would not respond by quitting. But as it happened, and in spite of the attempts



of the receptionist and her own supervisor to restrain her, she did quit, and the Board has no equitable jurisdiction, as her counsel seemed to argue, to deliver her from the consequences.

13. The Board finds that Pat Hand was not dealt with by the respondent contrary to the provisions of the *Labour Relations Act*, and the complaint is dismissed.

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**2291-81-R; 2292-81-R** Utility Workers of Canada, Applicant, v. **The Public Utilities Commission of the Borough of Scarborough**, Respondent, v. International Brotherhood of Electrical Workers, Local 636, Intervener

Trade Union Status – Whether step of electing officers pursuant to constitution taken properly – Only four of nine offices mentioned in constitution filled – Full election postponed for convention after certification obtained – Election of key officials sufficient to make organization viable - Status granted

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and O. Hodges.

**APPEARANCES:** *Chris G. Paliare and Gary Rainthorpe for the applicant; William Hutchison for the respondent; B. Fishbein G. Whyte, L. Barr and W. Moore for the intervener.*

**DECISION OF THE BOARD;** April 21, 1982

1. By decision dated February 22, 1982 in each of these applications for certification, the Board directed that a pre-hearing representation vote be taken in each application, that the ballot boxes be sealed pending further instructions from the Board, and that the matters be listed for hearing on the earliest possible date following the pre-hearing representation votes, for the purpose of allowing the applicant an opportunity to attempt to establish that it is a trade union within the meaning of section 1(1)(p) of the Act. As noted in those decisions, the applicant (the "U.W.C.") has not established its status as a trade union within the meaning of section 1(1)(p) of the Act in any prior proceedings before the Board. Accordingly, it is unable to rely upon section 105 of the Act which provides:

"Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause 1(1)(p), such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act."

2. The Board has indicated in a number of cases a series of steps which are generally sufficient to establish that a "trade union" has been brought into existence. Those steps were summarized as follow in *Associated Hebrew Schools of Toronto* [1978] OLRB Rep. Sept. 797, at paragraph 11:

- “1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally crafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) [now section 1(1)(1)] of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.”

(See also *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498, and *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472.)

3. It is clear from the evidence adduced before the Board that the first two steps were fulfilled. A group of approximately ten employees of the respondent who were dissatisfied with the intervener met in July of 1981 to discuss the alternatives open to them. At least some of those persons have been actively involved in the affairs of the intervener for a number of years. After considering and rejecting various existing trade unions, the group spoke with counsel (Mr. Paliare) about the steps necessary to form a new trade union. They were referred to Mr. Paliare by Dave Butler, a former business manager of the intervener. With the assistance of counsel, a draft constitution was prepared and was placed before a meeting of employees for their approval on January 24, 1982. That founding meeting was held at the home of one of the employees. After electing a *pro tem* chairman and a *pro tem* recording secretary, the employees reviewed the draft constitution and then unanimously approved it. The objects of the applicant are set forth in Article 2 of that document (hereinafter referred to as the “Constitution”):

“The objects of the Utility Workers of Canada are:

- \* To organize all people employed both in the public and private sectors of utility industry in the Dominion of Canada.
- \* To engage in collective Bargaining on behalf of the employees in bargaining units for which it has bargaining rights.
- \* To promote reasonable methods and hours of work.
- \* To cultivate feelings of friendship among those of our industry.
- \* To settle all disputes between members.

- \* To assist each other in sickness or distress.
- \* To secure adequate pay for our work.
- \* To seek a better standard of living.
- \* To seek security for the membership.
- \* And by legal and proper means to elevate the moral, intellectual and social conditions of our members, their families and dependents."

Thus, the purposes of the applicant clearly include "the regulation of relations between employees and employers" within the meaning of section 1(1)(p) of the Act which provides:

"1(1) In this Act,

• • •

- (p) 'trade union' means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency."

The Constitution also prescribes procedures for electing officers and calling meetings.

4. The eight employees in attendance at that meeting then each signed a combination application for membership in the U.W.C., and receipt. Each of them also paid a dollar on account of initiation fees in the U.W.C. The cards were duly countersigned by the collectors. At the hearing of this matter, counsel for the intervener contended that none of those persons had actually joined the applicant since (he submitted) the only way in which persons can become members of the applicant is through membership in a local. Thus, he argued that the applicant was not an "organization of employees" within the meaning of section 1(1)(p) since, in his submission, no employees had properly joined the applicant.

5. Article 14 of the Constitution provides:

#### "Admission of Members

Sec. 1. No L.U. [Local Union] can admit any applicant who formerly was a member of the U.W.C. [Utility Workers of Canada], or who was suspended or expelled by, or indebted to any L.U. without consent of the E.S. [Executive Secretary], and without first consulting the last L.U. of which the applicant was a member in regard to his character and record. The E.C. [Executive Council] shall decide any case in dispute.

Sec. 2. Each applicant for membership shall fill out an application blank furnished or approved by the E.S. and answer all questions.



Sec. 3. The acceptance of an application for membership, and the admission of the applicant into any L.U. of the U.W.C., constitutes a contract between the member, the L.U. and the U.W.C., and between such member and all other members of the U.W.C.

Sec. 4. An applicant for membership in the U.W.C. may be admitted into membership provided that he fulfils the following obligations:

'I ..... in the presence of members of the Utility Workers of Canada do hereby solemnly promise and swear that I will uphold the fundamental principles, doctrines and philosophy upon which this Union is founded. I further promise and swear that I will discharge my duties as a member of the U.W.C. and that I will support its working agreements, bylaws and Constitution to the best of my abilities and not sacrifice its interest in any manner.'

Sec. 5. The obligation card signed by the applicant shall be sent to the L.U.

The L.U. shall have each applicant, except as provided in Sec. 9 of this article, take the obligation before a regular meeting, or if it so decides, this may be done outside the regular meeting in the presence of the president or the vice president or the recording secretary.

Sec. 6. Each applicant shall pay the admission fee fixed by the bylaws of the L.U. to which he applies, or such fee as approved by the E.C. Admission must be completed within ninety (90) days after application is made.

Sec. 7. The names of all applicants shall be read at a regular meeting of the L.U. The president shall appoint a committee to pass and report upon the applications, or the E.B. [Executive Board] may perform this function, as the L.U. may decide.

Sec. 8. Any worker or employee coming under the U.W.C.'s jurisdiction, and residing where there is no L.U., who can qualify according to this Constitution, may become a member by filling out a regular application and sending it to the L.U. having jurisdiction, and if accepted, he shall sign the obligation card send it to the L.U. [sic]

The E.S. may accept such an applicant directly if he feels there are good reasons for doing so.

Sec. 9. In the case of an organizing campaign requiring membership as a governmental regulation Sec. 7 of this Article may be waived by the E.B."

Although Article 14 provides for membership in a local union of the U.W.C., membership in the U.W.C. itself, without membership in a local union, is also contemplated as evidenced by Section 4, which refers to an "applicant for membership in the U.W.C.", and Section 1, which

refers to “a member of the U.W.C.”. Moreover, Section 8 empowers the Executive Secretary of the U.W.C. to accept an applicant who resides where there is no local union, “directly”, which we construe to mean “directly into membership in the U.W.C.”. Other constitutional provisions which confirm that membership in the U.W.C. itself (as opposed to membership in a local union of the U.W.C.) was envisaged by the drafters of the Constitution include Article 4, Section 5 (which refers to “members of the utility Workers of Canada”); Article 17, Section 3 and Article 18, Section 1(19) (which refer to “membership in the U.W.C.”); and Article 18, Section 3 (which refers to “a U.W.C. member” and “a member of the U.W.C.”). Furthermore, acceptance of the argument raised on behalf of the intervener would lead to an absurdity. If the intervener’s position is correct, there could not be any “members” before a local union had been chartered. Under Section 1 of Article 6, it is the duty of the Executive Secretary to receive all applications for charters for the establishment of local unions, and to sign and grant them when authorized by the Executive President. Therefore, no local union could be chartered until after an Executive President and an Executive Secretary had been elected. However, no Executive President or Executive Secretary could be elected until there were members to vote in such election. Thus, Article 4, Section 1 (set forth below), which prescribes that the “first election of officers . . . shall take place at the founding meeting of the U.W.C.”, provides further support for the applicant’s submission that employees can, and did, become members of the applicant directly without becoming members of a local.

6. Accordingly, on the basis of our reading of the Constitution as a whole in the light of the statutory backdrop of section 1(1)(1) of the Act (which provides that “‘member’, when used with reference to a trade union includes a person who, (i) has applied for membership in the trade union, and (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union”), the Board is satisfied on the evidence before it that each of the eight employees who were in attendance at the meeting in question, became members of the applicant at that time by completing the aforementioned combination applications and receipts, and paying one dollar each in respect of initiation fees.

7. After each of the eight employees had signed a membership card and paid one dollar in respect of initiation fees, they unanimously passed a motion “to approve the constitution as presented”, thereby ratifying that document. Therefore, the Board finds that the applicant satisfied steps 1, 2, 3 and 4 as set forth in *Associated Hebrew Schools of Toronto, supra*.

8. It remains to determine whether officers were elected pursuant to the Constitution. Article 4 provides, in part, as follows:

“Sec. 1. The officers of the Utility Workers of Canada shall be the President, Vice President, Secretary, Treasurer and five (5) Executive Council Members. Except for the first election of officers, which shall take place at the founding meeting of the U.W.C. the officers shall be nominated and elected by duly elected delegates at the C. [convention].

They shall assume office thirty days after their election save and except the first election of officers who shall assume office immediately.

Officers elected pursuant to this Constitution shall serve for three (3) years or until their successors are elected and qualified save and except for the first election of officers who shall serve until the officers are elected at the first C.”

Gary Rainthorpe, who served as *pro tem* recording secretary at the founding meeting, testified that after the Constitution had been approved by a vote of the members, the members proceeded to elect officers. Mr. Rainthorpe was nominated and seconded as a candidate for the position of President. Since there were no other nominations for that position, Mr. Rainthorpe was acclaimed as President. Through a similar process, B. Hotchkin was acclaimed as Vice-President, D. Butler was acclaimed as Secretary, and D. English was acclaimed as Treasurer. No one was nominated, elected or acclaimed as an Executive Council Member. Thus, only four of the nine offices mentioned in Section 1 of Article 4, were filled. Mr. Rainthorpe testified that once the applicant has been certified, a convention will be called at which there will be "a total election" of President, Vice-President, Secretary, Treasurer and five Executive Council Members.

9. In determining whether an organization is a trade union within the meaning of section 1(1)(p) of the Act, one of the Board's primary concerns is whether the organization is viable. The importance of officers to the viability of an organization which seeks to regulate relations between employees and employers by obtaining bargaining rights and engaging in collective bargaining under the provisions of the *Labour Relations Act*, was described as follows in *J. Harris & Sons Ltd.*, 60 CLLC ¶ 16,177:

"Whatever the status of a trade union may now be at common law (see *International Brotherhood of Teamsters etc. Local 213 v. Therien*, [1960] S.C.R. 265), the Act, for at least some purposes thereof, clearly treats it as a legal entity separate and distinct from its membership. It may be a party to proceedings before the Board, it may bargain and negotiate for, and enter into collective agreements, and it may prosecute and be prosecuted. It would seem to follow, therefore, that a union's representatives are, at least insofar as some purposes of the Act are concerned, the representatives of the union as a juristic entity, and not merely the representatives of the individual members thereof.

How may a trade union under the legislation, perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations unless it has duly authorized persons by and through whom it may act and be bound? Without officers or other duly authorized persons, the applicant, by its constitution, may only act and be bound through a general convention of members. In this respect its position is somewhat analogous to a corporation which may only act and be bound by and through its officers or agents or its shareholders at a general or special meeting. Without authorized persons to act on its behalf every act of the applicant would require the sanction of a general convention of members with all the procedural requirements entailed thereby. It is obvious that this would impose such a restriction on its activities that for all practical purposes it would be impossible for it to carry out the purposes of its constitution. It is precisely for this reason that the applicant's constitution provides for the election of officers of an Executive Committee to govern and administer its affairs. This constitution prescribes, by means of the Executive Committee, the medium and machinery through which it will administer the articles of its constitution and effectuate its purposes and objectives. It also amounts to a form of agreement between the



organization and its membership which governs the rights and duties of its members and its officers in their relation to the organization and between themselves.

Further, it seems implicit in section 55 [now section 84] of the Act and the sections thereof which deal with collective bargaining and the rights, responsibilities and duties of trade unions, that a trade union will have responsible persons to act and make decisions on its behalf. In this regard section 55 provides, *inter alia*, that the Board... may direct any trade union... to file with the Board... a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

In regard to notices, proceedings before the Board, collective bargaining, conciliation and arbitration, the Act clearly presupposes the existence of responsible representatives to act on behalf of the union. It is obvious also that in order to operate in accordance with its constitution and the legislation, a union must have persons responsible and accountable to the membership for the collection and expenditure of union funds.

It is significant to note that Harris J. of the New Brunswick Court of Appeal in *The King v. The Labour Relations Board*, CCH CANADIAN LABOUR LAW REPORTER, Transfer Binder (1949-54), ¶15,038 at p. 11,303 refers to a trade union 'in the ordinary sense' as 'a body with a charter and construction with properly elected officers.'

The Board cannot subscribe to the argument that the question whether the organization has or has not elected officers is a mere matter of internal management extraneous to the issue of status as a trade union."

In that case, persons present at a "general meeting" on August 11, 1959, purported to elect officers. However, the applicant's constitution was not adopted until November 11, 1959. The Board ruled that the purported election of officers to the applicant organization before the adoption of its continuation was premature. It further held that since no officers had been elected after the adoption of the constitution, the applicant had "no officers elected in accordance with its constitution". Consequently, the Board found that the applicant had failed to prove its status as a trade union under the Act. (See also *University of Ottawa*, [1981] OLRB Rep. Feb. 232; *National Steel Car Corporation Limited*, [1979] OLRB Rep. June 542; and *Canada Trustco Mortgage Company*, [1976] OLRB Rep. Oct. 596.)

10. Evidence concerning the election of officers is of concern to the Board only insofar as it assists the Board in determining whether the organization is viable. In *Gold Crest Products Limited*, [1973] OLRB Rep. Aug. 436, the constitution of the applicant provided for the election of an Executive Committee composed of a President, a Vice-President, a Secretary-Treasurer, and three members at large. The evidence in that case indicated that the membership had "appointed a temporary committee to act pending election of a permanent committee". In rejecting the argument that the failure to elect a permanent committee in accordance with the constitution precluded a finding of trade union status, the Board wrote:

"4. The Board is primarily concerned with the constitution as a source of evidence of the existence of a viable organization and of evidence of the purpose and intent of the organization concerned so that the Board may be able to answer the question 'Is the applicant a trade union as defined by the Act?' (Re C.A.S.O. National (Inc) and Oakville Trafalgar Memorial Hospital Association, 1972 O.R. Vol. 2, 498). Inquiries made as to the election of officers are made with a view only to aiding in the decision as to whether the organization is viable. In the present case, there is an arguable point as to whether the appointment of the temporary committee lies within the constitutional powers of what must be said to be a general meeting of the membership. It is quite clear, however, that the temporary committee is actively engaged in the activities of the organization carried on to date. The matter of the constitutionality of its appointment and actions is one of internal organization of concern to the membership, none of whom, insofar as the Board was advised, have challenged that propriety of the action.

5. The Board therefore finds, upon all of the evidence, that the applicant is a trade union within the meaning of the Act."

The Board subsequently declined to vary or revoke that decision: See *Gold Crest Products Limited*, [1973] OLRB Rep. Sept. 469. In so doing, the Board drew the attention of the parties "to the reference made in the *Harris* case (*supra*) to alternative test of viability, i.e. the presence of officers elected in accordance with a constitution or otherwise authorized persons". (An application for judicial review of the *Gold Crest* decision was dismissed by Divisional Court on December 6, 1973 in an unreported decision in which the Court held that the Board "had jurisdiction" and "did not lose jurisdiction by reason of their decision" in the matter.)

11. Another example of the somewhat flexible approach which the Board has adopted concerning such matters is provided by the Board's decision in *Economical Mutual Insurance Company*, [1972] OLRB Rep. Feb. 176, in which the Board found a local chartered by the Canadian Labour Congress to be a viable entity that was a trade union within the meaning of the Act where there had been "substantial compliance with the requirements of the Constitution and By-laws" through the election of a president, vice-president, recording secretary, conductor, warden, and bargaining committee, despite the fact that three trustees had not been elected at the first meeting of the local, as contemplated by the by-laws. (An application for judicial review of that decision was dismissed without written reasons on June 30, 1972.)

12. In determining whether the applicant in the present case is a viable organization which qualifies as a trade union within the meaning of the Act, despite the fact that five Executive Council Members have not yet been elected, the Board has considered the functions of the various officers of the applicant as set forth in the Constitution. The functions of the President (who is also referred to in the Constitution as the "E.P.", i.e., the "Executive President") are described as follows in Article 5:

"Sec. 1. He shall preside at all sessions of the E.C. [Executive Council]. When unable to preside he shall select someone else in the absence of the V.P. to do so. He shall perform such other duties as are outlined in this Constitution and are necessary to protect and advance the U.W.C.

Sec. 2. The E.P. shall see that all other officers perform their duties. In case of non-performances of duties or disability or incompetence of any officer the E.P. has power to remove such officer, with such removed officer having the right to appeal to the E.C. He shall fill all vacancies, including those on the E.C. by appointment. Such appointments must be approved by the E.C.

Sec. 3. The E.P. is empowered as follows:

(1) To call a meeting of the E.C. whenever in his judgment such a meeting is necessary.

(2) To decide all questions of law, disputes or questions in controversy however arising, all his decisions being subject to appeal, including policy decisions, first to the E.C. and then the C. (Notice in writing of appeal from any decision of the E.P. must be filed with the E.S. and E.P. within thirty (30) days from date of such decision).

(3) To establish such departments in the organization as in his judgment are necessary to protect or advance the interests, or to meet the needs of the U.W.C.

(4) To employ an attorney or attorneys to act as counsel and give any other legal assistance, as the E.C. deems necessary.

(5) To audit the books and records of any L.U. or to engage an accountant for the purpose, whenever the E.C. deems such action necessary for the protection of the L.U. and its members.

(6) To prefer charges through the E.S. [Executive Secretary] against any member who, in his judgment, is violating the Constitution or working against the welfare of the U.W.C. Any member against whom charges are preferred shall be so notified by the E.P. in writing, and said member shall have the right to appear before the E.C. in his own defense.

(7) Either to suspend or revoke the charter of any L.U. that fails or refuses to observe the laws and rules of the U.W.C. with the concurrence of the E.C.

(8) To take charge of the affairs of any L.U. when in his judgment such is necessary to protect or advance the interests of its members and the U.W.C. but for a period not to exceed six (6) months. If the E.P. or his representative cannot or has not adjusted the affairs of the L.U. involved at the end of this period, then he shall refer the entire case to the E.C. which shall render a decision at its next regular meeting. The E.P. may suspend any local officer or member who offers interference in such cases.

(9) To remove or suspend any L.U. officer, representative, appointee or agent, except for L.U. B/M, for incompetence or for non-performance of



duties, or for failure to carry out the provisions of the Constitution and the rules herein, or the bylaws and agreements of the L.U. or for putting into effect or allowing to be put into effect any practice, rule, agreement, bylaw or policy not having approval of the E.C., or for failure to observe or carry out instructions or decisions of the E.P. When the E.P. suspends or removes any officer, representative, appointee or agent he can fill any such office or position by appointment of others, but the E.C. must approve of the E.P.'s action within ninety (90) days.

(10) To appoint, if he so decides, an appointee who may or may not be a member, to take testimony and report to him.

(11) To enter into, or authorize a representative to enter into, agreements with any national or international labour organization or association of employers, or with any company, corporation or firm, or inter-provincial business to cover the entire jurisdiction of the U.W.C.

(12) The E.P. or his representatives shall not enter into agreements affecting wages, hours and conditions of employment where local union agreement, covering such employment already exists, without first notifying at least thirty (30) days in advance of such agreements, the local unions so concerned or affected, and then only by procuring consent of a majority of the local unions or the individual local union affected by this agreement.

Sec. 4. The E.P. can, in any situation, delegate the powers of his office to the E.C.

Sec. 5. Nothing in this Constitution shall be construed to conflict with any of the provisions of this article."

Under Section 6 of Article 18, the President is required to "pass upon and determine all charges against any officer or representative of a local union" (subject to a right of appeal to the Executive Council). He also has the power to reopen any case or cases where there is new evidence or testimony, facts or circumstances which he feels are sufficient to justify such being done (Article 18, Section 8). He is also empowered to authorize charters to be granted for the establishment of local unions (see Article 6, section 1, *infra*).

13. Article 6 specifies the functions of the Secretary (who is also referred to in the Constitution as the "E.S.", i.e., the "Executive Secretary"):

"Sec. 1. The duties of the E.S. shall be:

To keep correct records of the proceedings of the E.C. and preserve all important papers of U.W.C. business; to deposit all funds in a bank or banks approved by the E.C. in the name of the U.W.C. subject to the joint signatures of two of the following three officers — E.P., E.S., E.T. [Executive Treasurer].

To pay all bills and claims legally due, and any disputed item when directed by the E.P., and no item when directed not to do so.

To keep a general roll of all members with the name, number of card and date of admission, together with those suspended, expelled, transferred, etc., and also to keep a correct financial account between each L.U. and the U.W.C.

To receive all applications for charters of the establishment of L.U.s, sign and grant them when authorized by the E.P., and retain charge of the seal of the U.W.C. and affix same to all official documents.

To receive all petitions for referenda or other votes, and to mail out the same with ballots when approved by the E.C., and to prepare for publication the results of all votes and all questions submitted to the E.C.

To prepare for publication each year, U.W.C. audit by the certified public accountant employed by the E.C.

To publish when necessary a correct directory of all L.U.s with names and addresses of all officers.

Sec. 2. The E.S. shall fifteen days prior to the month in which the C. convenes, furnish to the E.C. a correct record of the convention vote to which each L.U. is entitled.

Sec. 3. The E.S. and the E.C. are jointly empowered to make any investment of U.W.C. funds and to manage, change, exchange and sell any such investments and to make reinvestments and to borrow money — this power also includes the purchase, transfer, lease or sale of real estate.

Sec. 4. The E.S. shall perform such other duties as are prescribed by this Constitution.”

Moreover, as noted above, Section 8 of Article 14 empowers the Secretary to accept an applicant “directly ” who resides where there is no local union, if the Secretary “feels there are good reasons for doing so”.

14. Article 7 provides:

“Executive Treasurer

Sec. 1. All withdrawals of money shall be subject to the joint signatures of two of the following three officers —

Executive President  
Executive Secretary  
Executive Treasurer”

15. It appears that the Executive Council may be unable to transact business until such time as the five Executive Council Members referred to in Section 1 of Article 4 have been elected. Thus, the Board has also given consideration to the functions of that body in order to determine whether the applicant is a viable organization notwithstanding the failure of elect persons to those five positions. The pertinent constitutional provision in this regard is Article 8:

“Executive Council

Sec. 1. It shall be the duty of the E.C. to meet when necessary, to determine all proposed Constitutional amendments submitted for referendum vote and to attend to all business properly brought before it.

Sec. 2. The members of the E.C. may vote and transact business by correspondence with the E.S. and each other, but three members must concur to make such action valid.

Sec. 3. The E.C. shall be the committee on rules and credentials at all regular or special conventions and shall submit its report as such immediately after the convention opens.

Sec. 4. The E.C. shall have the power to try any L.U. or member charged with injuring the interests of the U.W.C. by actions in violation of the U.W.C. laws or the obligation of the member, and may revoke or suspend any charter or membership. (Nothing in this Constitution shall be construed to conflict with this power of the E.C.)

Sec. 5. When an appeal from any decision of the E.P. is made to the E.C. then the E.C. shall render a decision at its next regular meeting. However, the E.C. may, when it feels such is practical, act on an appeal by correspondence.

Sec. 6. It may suspend or revoke the charter of any L.U. that fails or refuses to observe the laws and rules of the U.W.C. or decisions rendered by proper U.W.C. authority.

Sec. 7. To take charge of the affairs of any L.U. when in its judgment such is necessary to protect or advance the interests of its members and the U.W.C., and to recommend suspension of any local officer or member who offers interference in such cases.

Sec. 8. If at any time the E.C. deems a new law necessary, it shall recommend a clause or clauses for the L.U.s to vote upon, and should a majority vote support the recommendation, it shall become a law.

Sec. 9. In case of a vacancy in the office of the E.P., the E.C. shall immediately convene and elect a successor to fill the office for the unexpired term.

Sec. 10. The minutes and report of each E.C. meeting shall be published in full at large.”



The Executive Council also has power to change the date on which a convention is to convene (Article 3, Section 2); to receive petitions calling for a referendum of the question of holding a special convention (Article 3, Section 3); to elect delegates to conventions of the Canadian Labour Congress, Ontario Federation of Labour, local labour councils, and any other conventions at which the U.W.C. may be entitled to representation (Article 3, Section 9); to approve purposes (in addition to those specified in the Constitution) for which the funds and property of a local union may be used (Article 13, Sections 5 and 6); to waive “in the case of an organizing campaign requiring membership as a governmental regulation” the requirements (under Section 7 of Article 14) that the names of all applicants (for membership in a local union) be read at a regular meeting of that local union and that the applications be passed and reported upon by a committee or by the Executive Board (Article 14, Section 9); and to act as a Trial Board to hear charges and try members for alleged violations of the Constitution, bylaws and working rules of the local union (Article 18, Section 1(b)). It also has some responsibilities concerning constitutional amendments.

16. Also of some relevance to the Board’s determination is evidence concerning the steps which the four existing officers of the applicant have taken to pursue the applicant’s objects. The evidence establishes that the existing officers have held two major organizational meetings for employees in the bargaining units for which the intervener currently holds bargaining rights. As a result of those meetings, which were attended by the applicant’s counsel, and also by a representative of the Ontario Federation of Labour and by a representative of the Canadian Labour Congress, the applicant has filed with the Board a total of 337 membership cards in support of the instant certification applications, 334 of which correspond to names of employees on the employer’s lists, which indicate that there were a total of 390 employees in the two bargaining units on the date of these applications. Thus, it is clear from the evidence that the existing officers have taken active steps to pursue the applicant’s organizational objectives with a view to displacing the intervener as a bargaining agent for the employees of the respondent in those bargaining units. Moreover, as in the *Gold Crest Products* case, *supra*, there is no evidence that any of the members of the applicant have challenged the constitutionality of the acclamation of the applicant’s officers at the founding meeting, or the constitutionality of those four officers governing and administering the affairs of the applicant until such time as the first convention is held.

17. Although this case falls close to the line, having regard to the substantial powers vested in the President, Vice-President, Secretary and Treasurer by the Constitution, and having regard to the effective manner in which those existing four officers, who were placed in office in accordance with the Constitution and who are the four highest ranking officers contemplated by the Constitution, have governed the affairs of the applicant to date, the Board is satisfied that the acclamation of those four persons to guide and control the activities of the applicant until such time as a full complement of officers is elected at the applicant’s first convention, is sufficient, together with the other steps that have been taken to bring the applicant into existence, to make the applicant a viable organization which qualifies as a trade union under the Act.

18. For the foregoing reasons, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

19. The Registrar is directed to list this matter for continuation of hearing on May 26, 27, and 31.

**1913-81-R; 1917-81-U Ontario Nurses' Association, Applicant/  
Complainant, v. Sudbury and District Health Unit, Respondent**

**Duty to Bargain in Good Faith – Successor Trade Union – Whether applicant having bargaining rights as successor trade union or by virtue of recognition – Employer's refusal to bargain with applicant due to doubt about applicant's status – Board not making bad faith bargaining finding at present time**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members W.H. Wightman and B.L. Armstrong.

***APPEARANCES:** Donald F.O. Hersey and Greta Barazzutti for the applicant/complainant; Michael Gordon, Dr. Brian Lynch and Peter Hughes for the respondent.*

**DECISION OF THE BOARD; April 1, 1982**

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

• • •

3. The issue to be determined in this matter is who holds the bargaining rights on behalf of the registered and graduate nurses employed by The Board of Health Sudbury and District Health Unit. The applicant in this matter claims that it holds the bargaining rights by virtue of being the successor trade union to the Nurses' Association Sudbury and District Health Unit or alternatively, by virtue of having been granted voluntary recognition by the respondent employer in February, 1975. The respondent employer, on the other hand, takes the position that the "Nurses Association Sudbury and District Health Unit — Local 87 — Ontario Nurses' Association" is the successor trade union which holds the bargaining rights at issue. The respondent refuses to enter into a collective agreement which shows the Ontario Nurses' Association as the union party to the agreement. In response to the respondent's position in this regard, the applicant has filed the section 89 complaint alleging a breach of the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement.

4. The Chief Executive Officer of the Ontario Nurses' Association wrote to the Director and Medical Officer of Health of the respondent Health Unit by letter dated January 2, 1975:

As shown by the attached letter, the Nurses' Association which has bargaining rights with you has merged with the Ontario Nurses' Association and has been chartered as "Nurses' Association Sudbury and District Health Unit — Local 87 — Ontario Nurses' Association."

The Ontario Nurses' Association is now seeking to acquire the rights, privileges and duties under the Labour Relations Act of the former nurses' association. There are two options available to accomplish this:

- (1) The employer by signing the attached agreement can voluntarily recognize O.N.A.

OR In the alternative

- (2) Applications can be made by O.N.A. to the Ontario Labour Relations Board under section 54(1) of the Labour Relations Act.

In the interests of a continuing, good relationship between the Health Unit and the nurses' association, we are asking that you consider the first alternative. We also request that you honour the existing collective agreement between the parties.

If you have any questions about the merger, please feel free to contact me. We look forward to a favourable reply from you by January 16th, 1975 at the latest.

5. The predecessor Nurses' Association had advised the respondent Health Unit of a merger between itself and the Nurses' Association of Ontario by letter dated December 12, 1974. The letter, over the signature of the local president, reads:

We wish to advise that the Nurses' Association Sudbury and District Health Unit at a meeting on October 8th, 1974, voted in accordance with our Constitution to merge with the Ontario Nurses' Association and has been chartered by that body as "Nurses' Association Sudbury and District Health Unit — Local 87 — Ontario Nurses' Association." We do not anticipate any change in our existing relationship as a result of this merger.

We will be holding our first annual meeting in the near future, and will notify you of our new officers at that time.

6. Under cover of a letter dated February 27 1975, the secretary of the respondent Health Unit advised the Ontario Nurses' Association that:

At their Board meeting of February 21st, 1975, the Board of the Sudbury & District Health Unit have agreed to recognize the Ontario Nurses' Association as bargaining agent for the former Nurses' Association Sudbury & District Health Unit who have merged with the Ontario Nurses' Association and is now chartered as "Nurses' Association Sudbury & District Health Unit — Local 87 — Ontario Nurses' Association."

and enclosed a Memorandum of Agreement dated February 21, 1975 which provides:

THE BOARD OF HEALTH SUDBURY & DISTRICT HEALTH  
UNIT

(operating the Sudbury & District Health Unit)

Hereby agrees to recognize that Ontario Nurses' Association has



acquired the rights, privileges and duties under the Ontario Labour Relations Act of the former Nurses' Association Sudbury & District Health Unit, which has merged with the Ontario Nurses' Association and is now chartered as "Nurses' Association Sudbury & District Health Unit — Local 87 — Ontario Nurses Association."

The Board further agrees to honour the existing collective agreement between the parties, being collective agreement between the Board of Health Sudbury & District Health Unit, and, Nurses' Association Sudbury & District Health Unit, dated April 16th, 1974.

7. The collective agreements which have been entered into subsequent to the execution of the voluntary recognition agreement have been styled as follows: The agreement for the period January 1, 1976 to April 30 1977 shows "The Ontario Nurses' Association Local 87 (hereinafter called 'the Association') as the union party. The persons signing on behalf of the union did so under the heading "The Ontario Nurses' Association Local 87". The next agreement entered into between the parties was for the period May 1, 1978 to December 31, 1979 and show the "Ontario Nurses' Association representing Local 87" (hereinafter called the 'Association') as the union party. The union signatures appear over the same heading. The two most recent agreements are framed in identical terms to the agreement which expired December 31, 1979. A representative of the Ontario Nurses' Association has been present during the negotiation of these collective agreements.

8. In a letter dated October 12, 1978 the Ontario Nurses' Association put itself on record as claiming that the heading on the Memorandum of Settlement signed a short while before "misdescribes the true parties to which they apply". The letter reads:

We are returning herewith signed copies of the Memorandum dated October 12, 1978.

We note that the heading on this document is consistent to the heading on the document to which it relates.

We maintain our position that the heading on both these documents misdescribes the true parties to which they apply.

Our signing on the Memorandum is for the purposes of maintaining consistency only and shall not be construed as acquiescence on the part of the Association of the missed description nor as a waiver of the position taken by the Local and by the Association that the proper parties should be Sudbury and District Health Unit and Ontario Nurses' Association.

We hereby retain our right to pursue this position through any proceedings which we feel are necessary.

It is not disputed that the position taken by the Ontario Nurses' Association is consistent with the position it had taken up to that point.

9. Mr. Peter Hughes, the business administrator of the respondent Health Unit since

1973, testified that the respondent thought it was recognizing a group of its nurses as a local with assistance from the Ontario Nurses' Association. He testified that he based his conclusion in this regard on the statement contained in the letter from the predecessor to the respondent dated December 12, 1974 that "we do not anticipate any change in our existing relationship as a result of this merger."

10. The Ontario Nurses' Association submits that on the evidence it must be found that the respondent Health Unit agreed to extend voluntary recognition to it on February 21, 1975 and that the bargaining rights thus obtained have been exercised since that time.

11. The respondent questions the validity of the merger in the face of the Ontario Nurses' Association's constitution which provides only for mergers between chartered locals. With respect to voluntary recognition, the respondent argues that it thought it was being asked to recognize Local 87 of the Ontario Nurses' Association and relies on the reference to the local union in the recognition agreement and the statement in the letter of December 12, 1974 that there would no change in the existing relationship.

12. In disposing of this matter we do not have to determine if a merger within the meaning of section 62(1) of the Act took place. The evidence in this case satisfies us that the respondent Health Unit extended voluntary recognition to the Ontario Nurses' Association on September 18, 1974 and further, that the Ontario Nurses' Association has continued to exercise the bargaining rights so obtained from that time to the present.

13. The recognition agreement dated February 21, 1975 is clear and unequivocal. The respondent Health Unit agreed to recognize the Ontario Nurses' Association. The reference to a maintenance of the existing relationship in the letter of December 12, 1974 to the respondent, over the signature of the local President, does not in any way undermine the voluntary recognition which was subsequently given. The December 12, 1974 letter states that "we do not anticipate any change in our existing relationship as a result of the merger." If this reference was intended to freeze the legal relationship, which we do not believe it was, rather than the day-to-day goodwill between the respondent and those in the bargaining unit, it is to be observed that there was subsequently a formal request for a change in the relationship which the respondent saw fit to agree to in a formal memorandum of agreement. The Ontario Nurses' Association is entitled to rely upon this agreement which is clear and unequivocal on its face. In the absence of any evidence to suggest that the bargaining rights so conferred have been terminated or abandoned, we consider the nomenclature used on the title and signing pages of the subsequent collective agreements, to constitute a technical deficiency in these agreements but not an impediment to the applicant's bargaining rights.

14. Having found that the Ontario Nurses' Association is the bargaining agent of the registered and graduate nurses of the respondent Health Unit, we decline to make a finding against the respondent under section 15 of the Act at this time. We are confident that the respondent, in the knowledge that the Ontario Nurses' Association holds the bargaining rights which it claims, will agree to enter into a collective agreement which is styled to reflect the existence of these bargaining rights.

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**2567-81-R; 2572-81-R; 2573-81-R; 2574-81-R; 2575-81-R;** Labourers' International Union of North America Local 607, Applicant, v. D.R. McCormick Electric Limited; Clow Darling Mechanical Contractor Ltd., Tamarron Construction Limited; Tamarron Group Inc., **T-2 Rentals Limited**, v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Interveners

**Certification – Construction Industry – Practice and Procedure – Pre-Hearing Vote – Intervener claiming bargaining rights – Because applications relate to construction industry pre-hearing vote directed despite complexity of issues raised – All ballots segregated – Each voter given two-way ballot and one-way ballot – One ballot to be counted depending on outcome of intervener's claim to bargaining rights**

**BEFORE:** D.E. Franks, Vice-Chairman, and Board Members L. Hemsworth and O. Hodges.

**DECISION OF THE BOARD;** April 6, 1982

1. These are applications for certification in which the applicant has requested that pre-hearing representation votes be taken.

2. The applicant contends that the appropriate pre-hearing voting constituency and bargaining unit for each of the respective applications is:

“all construction labourers and all employees engaged in cement finishing, wather proofing or restoration work in the employ of the respondent,

(i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario;

(ii) in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, in the District of Kenora inclusive of the Patricia Portion (OLRB geographic area 4),

save and except non-working foremen and persons above the rank of non-working foreman”.

3. At the pre-hearing vote meeting held on March 26, 1982 concerning these applications, counsel for the respondents (Mr. F. Bickford) advised the Board Officer that only the respondent Tamarron Group Inc., (hereinafter referred to as “Tamarron Group”) has employees who are affected by any of these applications as the respondent Clow Darling Mechanical Contractors Ltd. (“Clow Darling Mechanical”) employs only steamfitters and welders, the respondent R. D. McCormick Electric Limited (“McCormick”) employs only electricians, and the respondents T-2 Rentals Limited (“T-2”) and Tamarron Construction Limited (“Tamarron Construction”) have no employees anywhere. The applicant does not accept that assertion. Moreover, the applicant alleges that Tamarron Group, Tamarron Construction and T-2 are associated or related businesses or activities under common direction or control within the meaning of section 1(4) of the *Labour Relations Act* and



requests that the Board so declare. The applicant also seeks a section 1(4) declaration in respect of Clow Darling Plumbing and Heating Limited. (The latter Company is the respondent in another application for certification (Board File No. 2653-81-R) which has been filed with the Board by the applicant.)

4. Counsel for the respondents accepts the pre-hearing voting constituency and bargaining unit description submitted by the applicant in respect of Tamarron Group and also accepts that a similar voting constituency and bargaining unit description would be appropriate in respect of each of the other respondents if they employed persons who would come within that description, which, as noted above, is denied by the respondents. However, by letter dated March 30, 1982, counsel for the respondents has requested that the bargaining units should be limited to the industrial, commercial and institutional sector of the construction industry.

5. The intervener contends that it currently holds bargaining rights in respect of each of the respondents by virtue of a voluntary recognition agreement between it and Clow Darling Mechanical dated July 7, 1980; a voluntary recognition agreement between it and Tamarron Group dated July 9, 1980; a voluntary recognition agreement between it and Tamarron Construction dated July 9, 1980, and a collective agreement between it and General Contractors' Division of the Construction Association of Thunder Bay Incorporated, dated July 7, 1980. The applicant challenges the existence of any such bargaining rights. Clow Darling Mechanical and McCormick also deny that the intervener holds any bargaining rights in respect of them.

6. The intervener submits that the appropriate pre-hearing voting constituency and bargaining unit for each of the respective applications is:

“all employees employed by the Employer on all projects within the geographical District of Kenora (including the Patricia Portion) save and except for foremen, persons above the rank of foreman, office staff, timekeepers and persons bound by subsisting collective agreements to which the Employer is a party.”

The intervener further submits that at the time of these applications, none of the respondents except Tamarron Group had any employees in the relevant bargaining units and that, therefore, each of the applications except the application in respect of Tamarron Group (Board File No. 2574-81-R) should be dismissed. The intervener further contends that the respondents are related employers and seeks a declaration to that effect under section 1(4) of the Act.

7. The parties are in agreement that the same employees would be entitled to vote regardless of the ultimate description of the bargaining unit(s) as the employees allegedly represented by the intervener and those for whom the applicant seeks bargaining rights are the same. Further, that these employees are the same employees regardless of the disposition of the section 1(4) issue raised by the applicant and intervener but denied by the various respondents in the cases.

8. Although some of the matters raised by these applications are of such complexity that the Board might, in other circumstances, decline to direct that a pre-hearing representation vote be taken, in view of the fact that these applications pertain to the

construction industry where employment with a particular employer tends to be of relatively short duration, in view of the agreement of the parties that the same persons would be eligible to vote regardless of the ultimate description of the bargaining unit(s) and in view of the applicant's contention that these applications have given rise to 58 discharges from the construction project at which most, if not all of the employees affected by these applications are or were employed (which discharges are the subject of a section 89 complaint (Board File No. 2625-81-U), the Board is of the view that this is an appropriate case in which to exercise its discretion under section 9(2) of the Act to direct that a pre-hearing representation vote be taken with respect to the various respondents thereby minimizing the likelihood that the work force will disburse before having an opportunity to cast ballots in a representation vote.

9. It appears to the Board on an examination of the records of the applicant and the records of the various respondents that not less than thirty-five per cent of the employees of those respondents in the voting constituency hereinafter described were members of the applicant at the time the applicant was made.

10. The Board directs that a pre-hearing representation vote be taken of the employees of the various respondents in the following voting constituency:

All construction labourers and all employees engaged in cement finishing, water proofing and restoration work in the employ of (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, water proofing and restoration work in the employ of (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in all other sectors in the District of Kenora including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.

11. All employees of the various respondents in the voting constituency on the 23rd day of March, 1982, who have not voluntarily terminated their employment or who have not been discharged for cause between the 23rd day of March, 1982, and the date the vote is taken will be eligible to vote.

12. Because of the numerous and complex legal issues arising in these cases, the Board directs that all the ballots cast in this matter be segregated. More particularly, the Board directs that L. Almquist (classified by Tamarron Group Inc. as a general foreman), and G. Bushey (classified by Tamarron Group Inc. as a labourer) each be permitted to cast a ballot and that their ballots be segregated. The persons whose discharges are the subject of the section 89 complaint in Board File No. 2625-81-U and whose eligibility to vote is disputed, shall also be permitted to cast segregated ballots.

13. In view of the decision to grant a pre-hearing vote in this matter, and because the issue of whether or not the intervener has a bargaining relationship with any or all of the

respondents, we have decided to adopt an unusual procedure with respect to the vote ordered herein. Clearly, if the intervener has bargaining rights, the Board would conduct a vote giving the employees a choice between the applicant and the intervener. However, if the intervener has no valid collective agreement with the respondents or any of them then the Board would simply give the employees the choice of whether or not they wanted to be represented by the applicant. Since this matter cannot be determined without a hearing, we propose to determine the wishes of the employees in either event at the pre-hearing vote. Accordingly, each voter will be given two ballots. On one ballot voters will be asked to indicate whether they wish to be represented by the applicant or by the intervener in their employment relations with (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited. On the other ballot voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited. Depending on the outcome of the determination of the status of the intervener, the Board will count only one of the two sets of ballots cast.

14. The Board directs that the ballot box containing all of the ballots cast in the pre-hearing representation vote be sealed and that the ballots not be counted pending further direction by the Board.

15. The Registrar is directed to list these matters for hearing following the holding of the vote for the purpose of hearing the evidence and representations of the parties with respect to all matters arising out of and incidental to these applications.

16. In view of an order directing the voters to cast two different ballots set out in paragraph 13 above, the employers are directed to post the attached Appendix "A", Notice to Employees, alongside Form 69, Notice of Taking of Vote, given by the Registrar in these matters.

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## The Labour Relations Act

# NOTICE TO EMPLOYEES

### Posted by Order of the Ontario Labour Relations Board

To THE EMPLOYEES OF:

- (A) D. R. MCCORMICK ELECTRIC LIMITED
- (B) CLOW DARLING MECHANICAL CONTRACTORS LTD.
- (C) TAMARRON CONSTRUCTION LIMITED
- (D) TAMARRON GROUP INC.
- (E) T-2 RENTALS LIMITED

THE LABOUR RELATIONS BOARD HAS DIRECTED THE TAKING OF A PRE-HEARING REPRESENTATION VOTE WITH RESPECT TO CERTAIN EMPLOYEES OF THE EMPLOYERS LISTED ABOVE.

THIS VOTE MUST BE TAKEN BEFORE A HEARING IS HELD TO DETERMINE A NUMBER OF OUTSTANDING ISSUES BETWEEN THE PARTIES.

ONE SUCH ISSUE IS WHETHER OR NOT THE EMPLOYEES ARE PRESENTLY REPRESENTED BY THE LUMBER AND SAWMILL WORKERS UNION LOCAL 2693. BECAUSE THIS DECISION HAS NOT BEEN MADE IN THESE CASES, THE BOARD HAS DIRECTED THAT EACH EMPLOYEE ENTITLED TO VOTE WILL BE GIVEN TWO BALLOTS.

ONE BALLOT REFLECTS THE TYPE OF VOTE ORDERED BY THE BOARD WHERE THE EMPLOYEES ARE ALREADY REPRESENTED BY A TRADE UNION WHICH ANOTHER TRADE UNION SEEKS TO DISPLACE AND GIVES THE EMPLOYEES A CHOICE OF ONE OR THE OTHER TRADE UNION.

THE OTHER BALLOT REFLECTS THE TYPE OF VOTE ORDERED BY THE BOARD WHERE THE EMPLOYEES ARE NOT YET REPRESENTED BY A TRADE UNION.

ALL THE BALLOTS WILL BE SEGREGATED AND NOT COUNTED UNTIL AFTER A HEARING. AFTER THE HEARING, THE BOARD WILL DETERMINE WHETHER THERE IS A UNION PRESENTLY REPRESENTING THE EMPLOYEES AND WHICH IS THE PROPER FORM OF BALLOT.

DEPENDING ON THE RESULTS OF THIS DETERMINATION, THE BOARD WILL ORDER THAT THE APPROPRIATE GROUP OF BALLOTS BE COUNTED.

ONLY ONE GROUP OF BALLOTS WILL BE COUNTED. THE OTHER GROUP OF BALLOTS WILL NOT BE COUNTED.

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D. E. FRANKS  
VICE-CHAIRMAN

**This is an official notice of the Board and must not be removed or defaced.**

**1635-80-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, Applicant, v. Twin City Plumbing and Heating and Groff Plumbing & Heating Limited, Respondents**

**Abandonment – Construction Industry – Construction Industry Grievance – Applicant certified in 1974 – No collective agreement signed after impasse reached – No meetings held since 1974 – Whether now bound by provincial collective agreement – Board finding bargaining rights abandoned prior to coming into effect of province-wide bargaining legislation**

**BEFORE:** R.A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

**APPEARANCES:** *Stanley Simpson, Tom Crystal and Jack Porter for the applicant; D. I. Wakely, Robert Groff and A. Talvila for the respondents.*

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE;** April 27, 1982

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. In making this referral the applicant also relied on the provisions of sections 1(4) and 63 of the Act with respect to an alleged relationship between the respondents.
3. At the conclusion of the evidence, the applicant announced that it now was proceeding with argument with respect to sections 1(4) and 63.
4. In order for the applicant to succeed in this referral it is necessary to establish whether or not there is a collective agreement in effect between Twin City Plumbing and Heating ("Twin City") and the applicant.
5. The applicant and Groff Plumbing & Heating Limited ("Groff Plumbing") are bound by a provincial collective agreement in the industrial, commercial and institutional sector of the construction industry. Groff Plumbing was founded in 1945 by Howard Groff and was incorporated in 1957. It operates from premises on University Avenue in Waterloo. At that time the shareholders were Howard Groff and his three sons William Groff, Arthur Groff and Robert Groff and Florabel Groff. The latter remained as a shareholder until 1974 when she sold her shares to the other shareholders. Howard Groff ceased to have any financial interest in Groff Plumbing in 1970. On April 30, 1980, Robert Groff and Arthur Groff resigned as directors and they sold their shares to their brother William Groff, William's son Brian and Donald MacDonald. At the time of the resignations of Robert Groff and Arthur Groff, all contracts and jobs in progress remained with Groff Plumbing.
6. The genesis of Twin City commenced in the late nineteen thirties when Wilfred Kerr purchased Twin City and carried on a repair business at 56 John Street East in Waterloo. Mr. Kerr carried on business there for about seventeen years. In 1970, Mr. Kerr's business was sold to Howard Groff. At that time no change was made in the name, business location or telephone number. Babcon of Waterloo Limited ("Babcon") was incorporated to carry on the

business of Twin City and Howard Groff was the sole beneficial owner of the shares in this company. Carl Noe was hired as a plumber, gasfitter and steamfitter by Twin City in 1970. Mr. Noe and his family lived in the premises of Twin City on John Street East and subsequently Mr. Noe purchased the premises from a holding company and also enlarged the premises. These premises, however, continued to be used by Twin City in its business and Twin City paid a rental to Mr. Noe for the use of part of the premises. In 1975, John Griffin was hired as an estimator by Twin City. In May of 1980, Robert Groff, Arthur Groff, Mr. Noe and Mr. Griffin became directors and officers of Babcon. On May 1, 1980, the common shares previously held by Howard Groff were sold to the four directors and officers and preferred shares were also purchased to inject funds into Babcon so that Howard Groff could withdraw his money from the company.

7. The approximate annual sales for Babcon were as follows:

1971	\$ 31,000
1972	\$105,000
1973	\$126,000
1974	\$281,000
1975	\$200,000
1976	\$375,000
1977	\$477,000
1978	\$441,000
1979	\$632,000

The projected sales figures for 1980 were almost one million dollars. Although Twin City began as a service operation, by 1973 Twin City was performing ninety-five per cent new construction work and only five per cent new service work. Between 1970 and 1975, Twin City was hiring approximately one additional employee each year. By the end of 1975, Twin City had six full-time employees. After 1975, the number of employees increased by one to three additional employees each year. Between 1975 and 1980, Twin City has owned an average of five vehicles. There are only four unionized mechanical contractors in the Kitchener-Waterloo area who are larger than Twin City. Groff Plumbing and Twin City often compete for the same work and Twin City submits tenders and bids through the bid depository system. Twin City is in competition with union and non-union contractors.

8. On November 4, 1974, the Board issued a certificate to the applicant with respect to a bargaining unit of "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Twin City Plumbing and Heating in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman". Notice to bargain was given by the applicant on November 6, 1974, and two meetings were held. The appointment of a conciliation officer was requested and granted on December 10, 1974. The conciliation officer held a meeting on December 30, 1974, and on January 20, 1975, the Minister advised the parties that he did not consider it advisable to appoint a conciliation board. Twin City and the applicant have never signed a collective agreement and the applicant has not called or authorized either a strike or a picket line with respect to Twin City and has not filed a grievance until the instant grievance was filed. No meetings have been held between the applicant and Twin City since December 30, 1974.



9. Twin City contended that the applicant has abandoned the bargaining rights which it acquired in 1974. The applicant argued that it had not abandoned its bargaining rights and that Twin City was bound by the current provincial collective agreement in the industrial, commercial and institutional sector of the construction industry. After the letter from the Minister of Labour dated January 20, 1975, the next contact between the applicant and Twin City was a telephone call in the middle part of 1975 from Jack Porter, the business manager of the applicant, and Mr. Griffin. The evidence on the contents of the conversation is in dispute. Mr. Porter's recollection of the contents of this conversation differs from the recollection of Mr. Griffin and the recollection of Mr. Noe as he recalls Mr. Griffin's contemporary reference to the contents of the conversation. Having regard to the demeanour of the witnesses and to the searching cross-examination of counsel, we accept the recollection of Mr. Griffin as being an accurate recollection of what was said during this telephone conversation. During this conversation, Mr. Porter said that he knew Mr. Griffin was working for Twin City and asked if it was intended to operate Twin City as a union company. Mr. Griffin advised Mr. Porter that Twin City would be operated as a non-union company whereupon Mr. Porter replied that this meant war.

10. In our view, the evidence before the Board indicates that Mr. Porter knew that Mr. Noe and Mr. Griffin were working in the office of Twin City and that Twin City was operating as a non-union mechanical contractor from its premises in Waterloo. Mr. Porter and his assistant, Mr. Crystal, observed Twin City's trucks from time to time. In 1979, the applicant wrote a letter to the president of zone 7 of the Mechanical Contractors' Association protesting the conduct of individuals who operated both union and non-union companies. The applicant apparently regarded Twin City and Groff Plumbing as being one employer for the purposes of section 1(4) and/or being successor employers under section 63 up to the time of the hearing of this reference. Mr. Porter was aware of Mr. Griffin's background in estimating and it is not open to the applicant to claim that Twin City was engaged in service work rather than in construction work in the industrial, commercial and institutional sector. The name of Twin City appeared in trade directories and bulletins and the applicant caused one of Twin City's projects at the University of Waterloo to be picketed in 1980 after a union mechanical contractor had complained to the applicant. Between 1975 and 1980, virtually all of the work performed by Twin City was within the geographical jurisdiction of the applicant.

11. Until 1977 a large sign with the name of Twin City on it appeared outside its premises in Waterloo. After that time a smaller sign measuring two feet by eight inches was displayed on the building. The applicant was aware of a job being performed by Twin City at a restaurant but did not investigate the matter. While the applicant was negotiating collective agreements, the name of Twin City did not appear as an employer bound by a collective agreement which was in force between 1975 and 1977. Similarly, the name of Twin City did not appear on a memorandum of settlement which was signed in 1977.

12. The applicant was aware of the continued existence of Twin City since 1974. It was unable to sign a collective agreement with Twin City and deployed its resources in policing its collective agreements over its considerable geographic area. The evidence of Mr. Porter and Mr. Crystal make it clear that the applicant was reluctant to spend time and money in pursuing employers where collective agreements were unlikely to be concluded.

13. In *J. S. Mechanical* [1979] OLRB Rep. Feb. 110, the Board referred to the assessment of a bargaining relationship in order to determine whether a trade union has

abandoned its bargaining rights and looked at certain indicators. The Board in that case considered the length of the trade union's inactivity and whether it had made attempts to negotiate or renew a collective agreement. In the instant reference, the applicant has made no attempt to negotiate a collective agreement since 1975. The question is whether the applicant abandoned its bargaining rights before the introduction of the scheme of provincial bargaining which came into effect in 1978. In the instant reference, the applicant allowed more than three years to elapse in the industrial, commercial and institutional sector since it acquired its bargaining rights and an even greater period of time to elapse in the residential sector when a collective agreement was not in effect. The facts in the instant reference are similar to the facts in *John Entwistle Construction Limited* [1979] OLRB Rep. Nov. 1096 where the Board held that the trade union had abandoned its bargaining rights.

14. Having regard to the evidence and representations before it, we find that the applicant by not actively pursuing its bargaining rights abandoned its bargaining rights with respect to the bargaining unit of employees set forth in paragraph eight before the coming into force of provincial bargaining and provincial collective agreements in the industrial, commercial and institutional sector of the construction industry. It follows that Twin City is not bound by either the provincial collective agreement in the industrial, commercial and institutional sector of the construction industry or by any other collective agreement with the applicant.

15. Accordingly, this reference is dismissed.

#### **DECISION OF BOARD MEMBER H. KOBRYN;**

1. The facts in this case must be viewed against the background that exists in the Kitchener-Waterloo area where both the applicant and the respondent do business. This background, which is detailed below, is of common knowledge within the industry.

2. Unionized general contractors, who have successfully bid on construction projects, would then request bids for specialized work not normally performed by their own forces. The requests for bids would go to both union and non-union subcontractors, although the successfully bid project would be considered a union project by the building trades unions who service this area because the successful bidder is a fair general contractor.

3. The above situation does not exist in any other major manpower centre in this Province. Building trades unions in these other centres can assume that once a unionized general contractor successfully bids on a project, he will generally seek bids from unionized building trades subcontractors. This procedure is considered good labour relations as it will prevent any unnecessary labour problems once the project gets underway. This is analogous to an industrial plant setting wherein you are certified and serviced by one union.

4. In the Kitchener-Waterloo area many of the major general contractors based there, such as Ball Bros. Construction (who is mentioned in the evidence of this case) take the position that they only sign collective agreements with the Carpenters' and Labourers' unions and not with the rest of the building trades unions because the general contractors do not hire employees from these unions. Thus, they have no contractual obligations to these other trades to subcontract their respective work to unionized subcontractors.

5. For the same reasons, these other trade unions who are not signatories to a collective agreement with the general contractors, only with their respective trade contractor, cannot legally stop this hideous practice which creates so much instability in the area's construction industry.

6. This practice threatens the very existence of the unionized subcontractors and the building trades unions who represent their employees. Consequently, this encourages unionized subcontractors to establish second or dual companies within their family or business grouping so that one company can operate unionized and the other non-unionized. This destructive situation has existed for a number of years and still continues even though provincial bargaining has replaced area bargaining for all the building trades unions.

8. The facts in this case are as follows:

Mr. Howard Groff founded Groff Plumbing & Heating Limited in 1945. He had the company incorporated in 1957 with the shareholders being Mr. Howard Groff and sons Messrs. William Groff, Robert Groff, Arthur Groff and daughter Miss Florabel Groff.

On October 15, 1970, Mr. Howard Groff resigned as president and director of Groff Plumbing & Heating Limited and bought Twin City Plumbing and Heating through a holding company — Babcon of Waterloo Limited. He then became president of Twin City Plumbing and Heating.

On April 30, 1980 directors Messrs. Robert Groff and Arthur Groff resigned from Groff Plumbing & Heating Limited and joined the firm of Twin City Plumbing and Heating on May 1, 1980, where Carl Noe and John Griffon were already directors. Mr. Robert Groff had been doing the books of Twin City Plumbing and Heating on a monthly basis since 1970, when Mr. Howard Groff bought this company. Mr. Carl Noe has been general manager of Twin City since he was hired in 1970.

9. In response to complaints raised by unionized mechanical contractors in this area about Twin City operating as a non-union company, the union representatives of the Plumbers' Local 527 took action and organized this company. An application for certification was made to the Ontario Labour Relations Board in 1974 and after the taking of a representation vote, the union was certified with respect to the employees of Twin City. This certificate was issued prior to the time provincial bargaining began, so it covered all sectors of the construction industry. It may be noted that to date, no application has been made by the employees of this company to terminate the union's bargaining rights.

10. Notice to bargain was served upon the employer on November 6, 1974 and a meeting was held without any results. On November 15, 1974, the union was informed by letter (exhibit #21) that Mr. Carl Noe had been authorized to bargain on behalf of the company, but that any agreement must be ratified and signed by Mr. Howard Groff.

11. On November 28, 1974, the union made application for the appointment of a conciliation officer (exhibit #1) and on December 1, 1974, the appointment was made (exhibit



#3). The conciliation officer called a meeting of the parties on December 30, 1974 with Mr. Carl Noe and Mr. Jack Porter, business manager of Plumbers' Local 527 being present. Mr. Porter asked Mr. Noe to sign a collective agreement, to which Mr. Noe replied, "I have to take this up with Poppa Groff whether to maintain two union shops or just close up Twin City. There is no reason to sign agreement because we will not be around in six months if forced to sign an agreement. We will just close shop". This conversation is confirmed by a note written by Mr. Porter in his log book which is here before us as exhibit #26. This statement is not denied by Mr. Noe.

12. The next contact between the union and the company was the conversation between Mr. Porter and Mr. Noe of February 17, 1975. Mr. Noe informed Mr. Porter that he had no employees and that he was finishing a job by himself. Furthermore, Noe stated that the amount of work being done did not justify his \$2,000.00 a month salary with no work coming up. Mr. Noe denies the February 17, 1975 conversation with Mr. Porter, yet in his own evidence he indicates that at that time there were no employees but himself and that things looked bad.

13. In March 1974, Mr. John Griffon was hired by Twin City. He has been in the industry for many years and has worked for unionized and non-unionized companies. He negotiated with Mr. Howard Groff for his job and stated that the only reason he wanted this particular job was because this was a non-union company and he did not want to be involved with a unionized company.

14. Mr. Griffon had contacts in the Universities of Waterloo and Guelph when he worked for Nelco, which was a unionized company. It was his view that Nelco was losing the University work to non-union companies because it could not compete. Although Mr. Griffon told the employer that he wanted to operate on a non-union basis, no mention was made to him about the union being certified as bargaining agent in a representation vote just a few months earlier.

15. In May 1975, there was a conversation between Mr. Porter and Mr. Griffon over which there is conflict. According to Mr. Griffon, this conversation lasted only twelve seconds, and he made no written notation of it. Mr. Porter states that the reason for phoning was that after a short strike he had concluded a collective agreement for the years 1975 to 1977, and he wanted to speak with Mr. Noe about signing it. Mr. Griffon answered the phone and Mr. Porter was surprised to learn that Griffon was working with Twin City, as he thought that Griffon was still working for Black MacDonald. Griffon told Porter that Mr. Noe was not in, and Porter asked him to tell Mr. Noe to return the call. Mr. Noe did not call back. Mr. Griffon said Mr. Porter recognized him as soon as he answered the phone and seemed to know that he was working there. Griffon recalls that Porter asked him if we were going to be union or non-union, to which he replied non-union. Mr. Porter then said something like, this means war.

16. I am of the opinion that Mr. Porter's version is more plausible because the call took place soon after the new collective agreement was settled and it would have been logical for the union to call the employer about having same signed. At the time, this conversation would have no real meaning to Mr. Griffon and he made no notation of it; yet six years later he can remember the conversation vividly. I believe no further comment on this matter is necessary.

17. Twin City started picking up work from both Waterloo and Guelph Universities

and, according to Mr. Griffon, this amounted to forty per cent of the company's work between the years of 1975 and 1979. Mr. Noe thought this work was closer to sixty per cent of its total volume.

18. The company presented to the Board a list of the jobs the company bid on and was successful in getting during the years 1975 to 1979 (exhibit #19). Before a proper analysis can be made of this list, I want to refer to the evidence presented by the parties in regards to the size of the jobs and the costs involved as split between labour and material. Mr. Tom Crystal, the union representative, gave undisputed evidence that from thirty to sixty per cent of the cost of any mechanical job is for material and equipment. Furthermore, he stated that a job worth \$50,000.00 as a straight mechanical job would be quite substantial.

19. While on this subject, Mr. Noe gave a breakdown regarding the company's sales figures for 1978. Of \$441,000.00, twenty per cent of the cost was for labour (\$91,800.00), and twenty per cent for subcontracted out work (\$82,000.00). These figures indicate that the remainder of the costs was sixty per cent for material and equipment.

20. It is enlightening to note the above breakdown when considering the list of jobs which Twin City successfully bid (exhibit #19). Of the seventeen jobs listed for 1975, only two were for \$50,000.00 or more:

- (1) *University of Waterloo, Chilled Water System* — \$54,000.00, six tradesmen and three to four trucks were used. It took a year to complete the job.
- (2) *Great West Restaurant* — \$86,000.00, three tradesmen were used over a ten-month period. There were two jobs of \$20,000.00 or more:
  - (a) *Addition to Lutherwood Village* — \$24,000.00; and
  - (b) *Westmount Golf Course* — \$28,000.00.

For the year 1976, out of thirty-one jobs listed, only one job was for over \$50,000.00:

- (1) *Marsdale Nursing Home* in Cambridge — \$85,000.00, which had three tradesmen on it. There were only two jobs over \$20,000.00:
  - (a) *Marsland Bldg. University of Waterloo* — \$28,000.00; and
  - (b) *University of Waterloo — Condensate* — \$20,000.00.

For the year 1977, out of thirty-four jobs listed, only one job was for over \$50,000.00:

- (1) *University of Guelph* — alteration to piping — \$54,000.00 — four to five tradesmen used.

There were five jobs over \$20,000.00:

- (a) *St. Mary's Hospital* — \$20,000.00;
- (b) *Toronto-Dominion Bank* — 34,300.00;
- (c) *University of Guelph Swimmers Treadmill Bldg. 33* — \$28,000.00;
- (d) *C. N. R.* — \$24,000.00; and
- (e) *Computer Science Bldg. 26* — \$24,000.00.

For the year 1978, out of the twenty-six jobs listed, *none* were for more than \$50,000.00. Only one came close:

- (1) *University of Guelph, Animal Science Bldg. 70* — \$48,000.00.

In addition, there were four others for more than \$20,000.00:

- (a) *Conestoga College* — \$23,000.00;
- (b) *Lutherwood Village* — \$22,800.00;
- (c) *Zellers Store* — Guelph — \$17,400.00; and
- (d) *Ontario Die Co.* — \$21,300.00.

For the year 1979, three jobs were listed. None were for over \$50,000.00; only two jobs have the amount listed:

- (1) *Duke Restaurant* — Guelph — \$32,000.00; and
- (2) *Conestoga College* — \$24,600.00.

21. Of the one hundred and eleven jobs listed for the above years, only 3.6 per cent of these jobs were for \$50,000.00 or more, for a total of four jobs. Thirteen per cent of the listed jobs were \$20,000.00 or over, for a total of fifteen jobs. Also interesting to note is that there were no \$50,000.00 or over jobs in 1978 or 1979, and only one in 1977. The remainder of the one hundred and eleven listed jobs were very small and insignificant, especially when you apply the stated formula that twenty per cent of the cost of a job is for labour.

22. When one adds the increase in costs brought in by our present inflation (which has increased the cost of jobs at an average of at least ten per cent for the last number of years), this tends to make these jobs appear even smaller, relegating the majority of them to nothing more than service jobs. As an example as to what inflation has done to construction costs, one can refer to the cost of housing. In 1970, the price range of the average new home had been between \$30,000 to \$50,000. Identically-sized homes being built now are in the price range from \$130,000 to \$170,000. It is also common knowledge in the industry that a million dollar project around 1970 was considered a large construction project. Now a million dollar mechanical subcontract is not considered very large by the larger contractors in the business. Is it any



wonder that the representatives of the union and this company have not run into each other in all that time on jobs between the years 1975 and 1979.

23. When one examines exhibit #19 closely, it is apparent that the vast majority of the jobs listed are very small in size. This only confirms the point made by counsel for the union that the company wanted to keep a low profile in order to avoid confrontation with the union in those years up to May 1, 1980, when Messrs. Robert and Arthur Groff joined Twin City. Then, and then only, did the company start to do business in a big way and start to bid on any and all jobs that were available. That is when they were able to outbid the unionized subcontractors with their non-union rates of wages. This change in management procedure and method of operation was confirmed by the statements of Mr. Robert Groff when questioned by his own counsel about his and Arthur's departure from Groff Plumbing & Heating Limited, the unionized company run by Mr. William Groff. He stated:

"We reached a point where we differed on how to run the business, we just disagreed — objectives were different — not getting co-operation. Company seemed to be in a rut — profits were low — I wanted to see more sophisticated management procedures and methods of operating. William disagreed with these concepts — the offer to purchase came as a surprise, I thought that this was an opportune time to bail out."

24. Sometime after May 1, 1980, Twin City, under the management of Messrs. Robert and Arthur Groff, bid the University of Waterloo, Environmental Studies Bldg. to general contractor Ball Bros. Construction. This was the first large mechanical job they were successful in obtaining. Immediately thereafter, Ryan Mechanical complained to the union that they were outbid by Twin City. The union took immediate action, and went out to the job site. They found a Twin City construction shack and trucks on the project and they immediately set up a picket line. This happened in the second week of September, 1980. This action became a subject matter in a case before the Board under Board File No. 1219-80-U, which was settled on agreement of the parties.

25. During the period of 1975 to 1980, Mr. Tom Crystal, the business representative of the union, said he would call Mr. Howard Groff annually and ask him to sign the agreement. He stated that on most occasions Mr. Howard Groff would hang up on him. During this same period, Twin City was located in a single family residence on John Street where Mr. Carl Noe lived with his wife and two children. There was a sign on the house which was changed in 1977. This change made the sign less noticeable. During this time, according to company evidence, they acquired "eight" trucks, one each driven by Messrs. Noe and Griffon. These trucks gathered at the office at 8:00 a.m. and were dispersed by 8:30 a.m., although Mr. Noe's truck might have been there at other times.

26. On June 1978, the union requested that the Ministry of Labour appoint a conciliation officer in regard to residential sector negotiations. The name Twin City appeared on the attached list of contractors involved. Separate negotiations were required for the residential sector in 1978, as this sector was excluded from the provincial bargaining which covered only the industrial, commercial and institutional sector. Twin City denied receiving a copy of this list.

27. On May 1, 1978, provincial bargaining came into existence in the industrial,

commercial and institutional sector of the construction industry with the designation of employer and employee bargaining agencies. The United Association and its Locals formed the Employee Bargaining Agency ("E.B.A.") binding all its employees for whom the union had bargaining rights through signed collective agreements or through certification by the Ontario Labour Relations Board.

28. There is evidence to support the union's accusation that Mr. Robert Groff of Groff Plumbing & Heating Limited, who was serving on the Mechanical Contractors' Association Negotiating Committee, was running a double-breasted operation during this time. Mr. Porter's evidence is that at the time the union had nothing specific — Groff Plumbing and Twin City were father and sons related companies. At any time Twin City, which was supposed to be dormant, could suddenly mushroom and start taking union jobs. In answer to these accusations, Mr. Robert Groff said that the father has one company and the sons have the other company. The union did not appear to accept this explanation.

29. It was also at this time that the complaints from unionized contractors to the union were very sketchy about Twin City. This was because during this time the Mechanical Contractors' Association had in membership both unionized and non-unionized contractors and were very tight-lipped about the activities of their non-union members. There was no specific complaint about Twin City until Ryan Mechanical complained about the job Twin City successfully bid for (the University of Waterloo) which was the biggest job undertaken by the University for some time.

30. Twin City had a reputation prior to its sale to Mr. Howard Groff of being a small residential service contractor. This small operation was operated by Mr. Kerr from his house on John Street, and Mr. Carl Noe appeared to continue to operate it in the same vein. In fact, Mr. Noe made some improvements to the house in 1977 to make it more of a home than a business office. There was a reorganization of the operations of the company on May 1, 1980, when Messrs. Robert and Arthur Groff joined the firm with Messrs. Noe and Griffon. At this time, Messrs. Noe and Griffon became directors and shareholders of the company for the first time. Less than five months after the reorganization there was a confrontation with the union. In the meantime, Mr. Robert Groff had resigned from the Negotiating Committee of the Mechanical Contractors' Association because it became obvious that there would be a conflict of interest.

31. There is no evidence before this Board that the applicant had any intentions to abandon its bargaining rights with Twin City Plumbing and Heating, either by its own actions or by the acknowledgement of this fact to any employer or employee. In the past, the Board has dealt with the question of abandonment. Initially there was some doubt as to whether or not the Board had power to declare abandonment, as was outlined in *Frid Construction Ltd.* [1975] OLRB Rep. March 150. At paragraph 22, the Board stated:

"Counsel's third argument is that in the very least there ought to be a representation vote with respect to reinforcing rodmen. Counsel reasoned that intervener #2 was awarded bargaining rights for reinforcing rodmen twenty years ago and that since the Board no longer may find abandonment of bargaining rights since the decision of the Ontario Court of Appeal in *Shopmen's Local Union No. 743 of the International Association of Bridge, Structural and Ornamental Iron*

*Workers v. Brayshaw Steel Ltd. and United Steelworkers of America* 71 CLLC ¶14,084; the Board ought to acknowledge the existence of outstanding bargaining rights with respect to reinforcing rodmen.”

And a paragraph 28 it continued:

“There remains for consideration the question of whether intervenor #2 currently holds bargaining rights for reinforcing rodmen quite apart from the provisions of the collective agreement referred to in paragraph 22 herein. The Board has not terminated the bargaining rights of intervenor #2 with respect to reinforcing rodmen and since the decision of the Ontario Court of Appeal which was referred to in paragraph 22 herein, there is some considerable doubt concerning whether the Board may find abandonment of bargaining rights in this application. In the result, the Board finds that intervenor #2 still possesses bargaining rights for reinforcing rodmen within the geographic area defined in the certificate issued by the Board on February 10, 1955.”

32. Since then we have *John Entwistle Construction Ltd.* [1979] OLRB Rep. March 211 (application for judicial review dismissed) in which the Board found abandonment on the particular facts of that case. At paragraph 11, the Board stated:

“The issue of whether a trade union has abandoned its bargaining rights must be determined on the particular facts of each case. The Board has looked to a variety of factors in the bargaining relationship as indicators of whether bargaining rights have been abandoned. Some of these are canvassed in paragraph 5 of *J. S. Mechanical* [Board File No. 1677-78-R (as yet unreported)] and include: the length of the union’s inactivity; whether it has made attempts to negotiate a collective agreement or sought to administer an existing collective agreement; whether terms and conditions of employment have been changed by the employer without objection from the bargaining agent; and whether there are any extenuating circumstances which might explain an apparent failure to assert bargaining rights.”

33. On the matter of intent, there must be an animus wherein the party has demonstrated its intent to abandon its bargaining rights through the termination sections of the *Labour Relations Act*, which section also allows the employer and the employees to apply for termination of bargaining rights. No such actions have taken place in this case.

34. The time period involved, by itself, is not conclusive as was stated in *Dravo of Canada Limited* [1977] OLRB Rep. Sept. 569. At paragraph 5, the Board stated:

“The parties agreed that the collective agreement had expired on August 31, 1973, and that on June 21, 1977, the trade union had given the employer written notice to bargain with a view to making a collective agreement. From the currency of the collective agreement which expired on August 21, 1973, until June 21, 1977, there was no contact between the parties. Since 1973 the employer has not employed carpenters in the area until the summer of this year.”



And at paragraph 13:

“The Board now considers the third ground which was advanced by the employer. The employer referred to several decisions of the Board which enunciated the proposition of abandonment of bargaining rights by trade unions. Some of these decisions were written before (and some after) the decision of the Ontario Court of Appeal in *Brayshaws Steel Ltd.* (1971), 26 D.L.R. (3d) 153, where Jessup, J.A. stated at p. 159:

The question therefore is whether the Board had the power to make the vitiating declaration that it did. No such express power is asserted but it is said that such a power is to be implied from the words in s. 5(1) of the statute, ‘are not bound by a collective agreement’. These words are said to empower the Board not only to find whether there is in existence a collective agreement within the meaning of s. 1(1)(c) and to find the employees affected by it but also to find, on the application of such equitable principles as the Board may think proper, whether the agreement is operative for any purposes. Clearly the Board has no inherent jurisdiction. Since its powers are statutory they must be found in clear language of necessary intention. In my opinion the only powers conferred on the Board by s. 5(1) are to ascertain whether a collective agreement within the meaning of s. 5(1) exists and to determine the persons such agreement affects: the words ‘bound by’ in s. 5(1) simply express the legal result of s. 37 of the statute. That section binds the Board as well as the parties to a collective agreement. In my view, the quoted words from s. 5(1) could read, in the same sense, ‘are not included in (or affected by) a collective agreement’. Where the Legislature has deemed it expedient for the Board to have power to render a collective agreement inoperative, it has granted the power by express words as in s. 45a(4) [enacted 1964, c. 53, s. 5; rep. & sub. 1970, c. 85; s. 20(2) (now s. 52(4))], an express grant of power which would be redundant if the Board has the equitable jurisdiction contended for. It is also significant that ss. 39, 42, 43 and 44 [now ss. 44, 48, 49 and 50] also expressly provide that, upon certain findings by the Board, collective agreements cease to operate.”

The only indirect reference to abandonment in the Act is found in section 49(5) [now section 57(5)] where a trade union may inform the Board that it does not desire to continue to represent employees in the bargaining unit. However, even assuming for the purpose of argument that the Board does have power under the Labour Relations Act to find abandonment of bargaining rights, the Board is of the view that the facts set forth in the reference would not support a finding of abandonment of bargaining rights by the trade union. Where there has been an absence of employees (as is common in the construction industry) who would be covered by successive collective agreements, *the lack of contact by the bargaining agent with the employer during the period of such absence would not support a finding of abandonment of bargaining rights by the trade union.* In this regard see *Dominion Bridge* [1971] OLRB Rep. Apr. 201.

35. In this case there was no obvious presence or opportunity to observe the employer as in the case above. For five years the employer kept a low profile and the parties did not run into each other on any of the projects in the area. This is confirmed by the employer's evidence. Thus, the time factor alone is not a decisive factor in this case. Furthermore, although the onus is on the employer to prove that the union has abandoned its bargaining rights, there was no such evidence put forth by the employer.

36. Counsel for the applicant argued that there must be a distinction between waiver or estoppel on the one hand, and abandonment by which some conclusion can be reached. If a party has knowledge of something and chooses not to exercise its rights or take a course of action, it may be faced with waiver or estoppel of rights, and thus it cannot claim damages based on the other party's actions. It is necessary to weigh that against having knowledge of the violations and having to give up one's rights for all time. At most, a party should be faced with waiver or estoppel from asking for damages beyond the date of the filing of a grievance, unless unusual circumstances are proven.

37. Did the union know of its rights and do nothing? Is it simply estopped from seeking damages based on its rights or did it give up its right for all time? One must look to the difference between the industrial, commercial and institutional sector and residential sector bargaining. Was the notice to bargain in the residential sector given on June, 1978, some evidence that the union knew or ought to have known that Twin City was doing service work in that sector? As to the industrial commercial and institutional sector, provincial bargaining came into effect on May 1, 1978 and became binding on all employees in the industrial, commercial and institutional sector with whom the union had bargaining rights, either through their collective agreements or certificates issued by the Board.

38. There is no evidence in law that the union intended to abandon its bargaining rights in the industrial, commercial and institutional sector in either period of time prior to the inception of provincial bargaining or subsequent to provincial bargaining. Primarily, the union assumed that the employer was only engaged in residential service work. There is also evidence by union representative that they did not encounter the company on any of the union projects and this is confirmed by the employer's evidence. This is supported by their assumption that the company was doing only residential sector work. The union did not act on this assumed knowledge of residential service work and, therefore, they may have waived their right of action in this sector. Hence, they may be estopped from claiming any damages beyond the time of the filing of this grievance.

39. The one thing we cannot ignore in this case is the anti-union animus on the part of Messrs. John Griffon and Carl Noe, the two people operating this company since March of 1975; after the time at which the union was certified and right up to the time the company was reorganized on May 1, 1980. These two gentlemen were certainly not going out of their way to let the union know where and how they were operating the business; for example, what work they were bidding. They were not prepared to bid on jobs of the size that would draw the attention of the union representatives to their operations. In essence, the timeliness aspect really begins when the company changed its whole profile; when Messrs. Robert and Arthur Groff joined the company on May 1, 1980. Shortly thereafter, they had their first confrontation with the union when they bid their first large mechanical job.

40. For all the above reasons, the union's application should succeed because there has

been no abandonment of bargaining rights. The Board should declare that Twin City Plumbing and Heating is bound by both the provincial collective agreement in the industrial, commercial and institutional sector of the construction industry and by any other collective agreement which it has with the applicant.

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**2104-81-R Retail Clerks Union, Local 409, Applicant, v. United Security Limited, Respondent.**

**Bargaining Unit – Certification – Security Guard – Whether subject employees security guards – Function to search passengers and luggage for explosives and weapons etc. – Whether “employed as guard to protect property of an employer” – Whether interchange of employees between airport and employer’s other Thunder Bay locations – Whether unit confined to airport appropriate**

**BEFORE:** George W. Adams, Q. C., Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *Clifford Evans for the applicant; and B. Burton, W. Bot and Suresh Bhasin for the respondent.*

**DECISION OF THE BOARD; April 26, 1982**

1. This is an application for certification.
2. The Board is satisfied that the applicant is a trade union within the meaning of the *Labour Relations Act*.
3. The bargaining unit as proposed by the applicant is “all employees of the respondent working at Thunder Bay International Airport other than those employed as guards protecting the property of employers save and except manager, and persons above that rank”. The parties are agreed that if a certificate is to be issued no distinction ought to be made between part-time and full-time employees. In other words, the unit is to be a comprehensive one.
4. However, the respondent takes the position that (a) all of the employees are security guards within the meaning of the Act and that therefore the applicant trade union is not entitled to be certified as bargaining unit on their behalf having regard to the requirements of section 11 of the *Labour Relations Act*; and (b) the unit requested is inappropriate because the employment of the employees in question is not restricted to the airport but includes other locations within the Thunder Bay area. Having regard to the respondent’s objections the Board appointed a labour relations officer to inquire into and report back to the Board about the duties and responsibilities of the employees in the proposed unit and to inquire further into the appropriateness of the bargaining unit. The report of the labour relations officer has been completed and the Board now has the related representations of the parties.
5. The parties agree that the evidence of Ms. L. Turcotte would be representative of all



the persons working in the applicant's proposed unit. This application for certification was filed on January 4th, 1982. Ms. Turcotte became employed by the respondent on August 8th, 1981. At the time of the examination she was working at the airport checking the baggage and scanning the passengers prior to loading and boarding. Her hours are from 6:00 a.m. until 2:00 p.m. She indicated that two employees come in for the 6:00 a.m. to 2:00 p.m. shift; one employee comes in and works a shift from 1:00 a.m. until 5:30 p.m.; and two other employees come in for a shift from 2:00 p.m. until 10:00 p.m. The search procedures are designed to detect weapons, bombs, and explosives. She did not believe she had the power of arrest. Pilots, co-pilots and stewardesses do not walk through the scanning area and thus the security guards have no particular function with respect to these persons. Security guards appear to be issued a licence under the *Private Investigators and Security Guards Act* upon application to the Ontario Provincial Police.

6. Ms. Turcotte indicated that she had worked both at the Canada Games and on patrol in addition to her duties at the airport between August of 1981 and January of 1982. She worked for the respondent under a security contract with Canada Games for two weeks in the month of August. This contract appears to have applied to a geographic area including Confederation Park, certain other parks and recreation areas, and to the airport and Fort William Gardens. She said she was involved in crowd control for one day and, thereafter, was located at the trailer for the rest of the time. Other employees at the airport were involved in the Canada Games too. Some worked their shift at the airport and then worked at the Canada Games as extra duty. Others were scheduled at the Canada Games rather than at the airport during this two week period. The other non-airport work experience of Ms. Turcotte involved one evening of patrol in September. This was on her day off. She indicated that three other employees alternated between the airport and a Thunder Bay mail processing plant as required. Thus, there are seven regular employees stationed at the airport and three others who alternate between various locations as need arises. The seven regular employees can also be scheduled elsewhere but this appears to have happened only twice since August of 1981. Thus, the vast majority of their time is spent at Thunder Bay International Airport.

7. Testimony was also received from Leslie Raine, Branch Manager of the respondent in Thunder Bay. He confirmed that applications are made to the Ontario Provincial Police, Registration Branch, in Toronto to obtain a licence for the respondent's employees to act as security guards. If the employee qualifies by not having a criminal record, a licence is usually issued. He indicated that the company could assign a person working at the airport to work somewhere else. He agreed that the seven employees at the airport were principally located there but said that there was no restriction on the employer moving these people to other locations if it became necessary. Indeed, other than for the Canada Games, the seven persons had worked exclusively at the airport up until the filing of the application for certification. A Mr. Tolmie, who works at the airport, has a dual licence to act as a private investigator and as a security guard. Accordingly, he has been assigned to investigations from time to time both at and away from the airport. Another employee, Mr. Lejeune, was said to have been on patrol away from the airport for roughly one hundred and ninety-eight (198) hours during the month of December and Mr. Lejeune is one of the three additional people who come to the airport on an 'as needed' basis. At other times these three employees are either on patrol or providing guard duty services to the mail processing plant. He further testified that as of January 4th, the seven employees regularly stationed at the airport included four full-time workers and three part-time workers.

8. The Board is confronted with two principal issues. The first is whether or not the persons subject to this application are employed as security officers within the meaning of the Act. If they are not so employed, the second issue is whether or not the unit is appropriately confined to employees working at Thunder Bay International Airport having regard to the employer's allegation of regular interchange between the airport and other locations in the Thunder Bay area.

9. Dealing with the first issue, section 11 of the *Labour Relations Act* reads as follows:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employer's organization shall be required to bargain with the trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

Are persons subject to this application "employed as a guard to protect the property of a employer"? It is the respondent's position that all such persons are qualified security guards who have been licenced to provide security functions and that in scanning for bombs, weapons, etc., they are protecting the property of air carriers who are employers. It is submitted that the fact that such actions also benefit the health and security of passengers does not mitigate from the fact that those actions also protect the property of the airlines. We are of the view that section 11 has no application in the instant matter. As can be seen from section 11, its purpose is to preclude a conflict of interest arising from a trade union representing both security guards and the employees subject to the monitoring authority of such guards or a conflict of interest arising out of the affiliation of a trade union representing guards with other trade unions representing the employees monitored by those guards. In the case before us, it is clear that the persons employed by the respondent at the airport have no relationship with employees of airline carriers and therefore they are not protecting the property of airline carriers in their capacity as employers. In *Metrol Security Limited* [1980] OLRB Rep. Dec. 1755, the Board ruled in a similar fashion when confronted with almost identical facts. At paragraph 11, the Board had the following to say:

With respect to the employees in Category II, the Airport Security Guards, the matter is somewhat difficult. It can be argued that their function is to protect aircraft and passengers in aircraft from hijacking. Insofar as the airlines are employers, it might be said that they are protecting the property of an employer. However, such an interpretation would strain the plain language of section 11, clearly this section reads "employed as a guard to protect the property of an employer" and does not read, for instance, "employed as a guard to protect the property of a person". The term "employer" as used in section 11 brings into play the employment relationship, that is, the guard protecting the property of an employer as employer. The security guards at the airport do not protect the property of the airlines as employers but rather they protect the property of the airlines from hijackers. Therefore, they are not guards within the meaning of section 11.

To rule otherwise would be to restrict the freedom of choice of employees to choose a trade union of their liking even where no possible conflict of interest could arise because of the affiliation of that trade union with other trade unions whose memberships are not restricted to security guards. See section 3 of the *Labour Relations Act*.

10. This brings us to the bargaining unit configuration problem. The Board usually gives municipal wide bargaining units and does not confine certification to a particular plant or workplace location. However, where there is more than one plant or workplace within a municipal area, the Board must determine whether a single location is appropriate. Where there is no substantial interchange between workplaces or work locations and where the location in question is not so small in terms of the number of employees as to fragment the collective bargaining process unduly and undermine the viability of a particular bargaining unit, a single location will be granted. On the fact before us we cannot conclude that there is substantial interchange or that a unit confined to Thunder Bay International Airport constitutes undue fragmentation resulting in a bargaining unit that is unlikely to be viable.

11. The Board finds that all of the employees of the respondent working at Thunder Bay International Airport save and except manager, and persons above that rank, constitute an appropriate unit for collective bargaining.

12. For the purposes of clarity, the Board acknowledges the parties agreement that Ms. L. Turcotte should be excluded from this unit in that it is agreed she is employed in a managerial capacity.

13. The Board finds that as of January 4th, 1982, excluding Ms. Turcotte, there were nine employees in its bargaining unit. As of the terminal date, January 15th, 1982 and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act that five employees were members of the applicant. Accordingly, on the evidence before it, the Board is satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on January 15th, 1982, the terminal date fixed for this application.

14. A certificate will issue to the applicant.

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**2460-81-R Welland Typographical Union, Local 927, Applicant, v. Welland Evening Tribune, a Division of Canadian Newspapers Company Limited, Respondent, v. Group of Employees, Objectors**

**Bargaining Unit – Dispute whether editorial employees in separate unit – Prior Board decision directing vote to ascertain wishes of editorial employees – Majority of employees voting for inclusion in comprehensive unit – Board describing unit accordingly**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

**DECISION OF THE BOARD;** April 27, 1982

1. Pursuant to its order dated March 26, 1982, upon the agreement of the parties the Board conducted a vote of the editorial employees of the respondent to determine their wishes respecting the bargaining unit.
  2. The vote was held on April 5, 1982. Of 15 ballots cast 12 favoured a bargaining unit of all editorial, circulation advertising and administration employees. Three ballots favoured a bargaining unit of editorial employees only.
  3. It is, of course, for the Board to determine the scope of the bargaining unit or units in every application for certification. The wishes of the employees is a factor that may be considered, however, in making the Board's determination. In the instant case, because the Board is charting new directions for bargaining units in the newspaper and printing industry, it was felt that, given the agreement of the parties, the evidence of employee wishes might prove helpful in considering whether editorial employees should bargain separately or with other employees of the respondent newspaper. Given the overwhelming margin of support among the editorial employees for bargaining in a more comprehensive unit with other employees the Board is inclined to give substantial weight to the evidence of the employees' wishes. The result of the vote, moreover, concides with the Board's general preference for broader based, more comprehensive bargaining units.
  4. Pending the resolution of the status of the sports editor, interim certification hereby issues to the applicant in respect of all employees of the respondent whose main office is located at 228 Main Street, Welland, including employees at the Port Colborne district office save and except employees covered by a collective agreement, the publisher, managing director, city editor, news/wire editor, accountant, advertising manager, advertising manager (Port Colborne Office), classified advertising supervisor, circulation department manager, secretary to the publisher, students employed for the school vacation periods and persons regularly employed for not more than 24 hours per week.
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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1982

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**1096-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. C D C Contracting, a division of Patron Contracting Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman and persons above the rank of non-working foreman". (5 employees in unit).

**1242-81-R:** The International Brotherhood of Painters and Allied Trades Local 1824, (Applicant) v. Lynco Painting Contractors A Division of #374861 Ontario Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

**1533-81-R:** Ontario Nurses' Association, (Applicant) v. Leisure World Nursing Homes Ltd., (Respondent) v. Employees, (Objectors).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity in its Leisure World Nursing Home in the City of Toronto, save and except the Director of Nursing, the Assistant Director of Nursing, persons above the rank of Assistant Director of Nursing, the evening Supervisor, the night Supervisor, and persons regularly employed for not more than twenty-four hours per week". (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1610-81-R:** United Steelworkers of America, (Applicant) v. Koolrad Design & Manufacturing Company Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Oshawa, Ontario, save and except supervisors, persons above



the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (46 employees in unit).

**1679-81-R:** International Brotherhood of Painters and Allied Trades — Local 1891, (Applicant) v. Frank Ruffolo Painting Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

**2005-81-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Pilex Enterprises Limited carrying on business under the name and style of Special Foundation Systems, (Respondent) v. Labourers' International Union of North America, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

**2265-81-R:** International Brotherhood of Painters and Allied Trades, Local 557, (Applicant) v. Hy-Power Coatings Limited, (Respondent).

Unit: "all employees of the respondent working at or out of the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (15 employees in unit). (*Having regard to the agreement of the parties*).

**2266-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Myriad Holding Corporation Limited, Hereditary Holdings Limited and Pyramid Oak Tree Inc. carrying on business under the name and style of Evergreen Holding Group, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

**2289-81-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Leon's Furniture Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in Burlington, Ontario save and except supervisors,

those above the rank of supervisor, office and sales staff, those regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (29 employees in unit). (*Having regard to the agreement of the parties*).

**2298-81-R:** Service Employees Union, Local 478, (Applicant) v. Canadian Red Cross Society, Ontario Division Haliburton Red Cross Hospital, (Respondent).

Unit #1: "all employees of the respondent at its hospital in Haliburton, Ontario, save and except professional medical staff, graduate and undergraduate nurses, paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its hospital in Haliburton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nurse, paramedical personnel, office and clerical staff, supervisors and persons above the rank of supervisor". (3 employees in unit). (*Having regard to the agreement of the parties*).

**2299-81-R:** The International Association of Machinists and Aerospace Workers, (Applicant) v. Riverside Chrysler Plymouth Ltd., (Respondent).

Unit: "all office employees of the respondent in Sault Ste. Marie, save and except department managers, those above the rank of department manager, salesmen, persons regularly employed for not more than twenty-four(24) hours per week and students employed during the school vacation period". (2 employees in unit). (*Having regard to the agreement of the parties*).

**2309-81-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Superior Office Supplies (1980) Ltd., (Respondent).

Unit: "all employees of the respondent working in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office and sales staff". (13 employees in unit).

**2320-81-R:** United Steelworkers of America, (Applicant) v. Ontario Telephone Answering Service. A Division of Ontario Safety & Communications Services Ltd., (Respondent).

Unit: "all office, clerical and technical employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff and persons regularly employed for not more than twenty-four hours per week". (9 employees in unit). (*Having regard to the agreement of the parties*).

**2330-81-R:** Labourers International Union of North America, Local Union No. 493, (Applicant) v. ICG Canadian Propane Ltd., (Respondent).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except foremen, persons above the rank of foreman, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (4 employees in unit). (*Having regard to the agreement of the parties*).

**2333-81-R:** Canadian Union of Operating Engineers & General Workers, (Applicant) v. ITT Grinnell, Division of ITT Industries of Canada Ltd., (Respondent).

Unit: "all stationary engineers and persons employed as their helpers at the respondent's foundry at 2440 Dundas Street West in Metropolitan Toronto, save and except the Chief Engineer and persons above the rank of Chief Engineer". (3 employees in unit). (*Having regard to the agreement of the parties*).

**2336-81-R:** Ontario Nurses' Association, (Applicant) v. Southampton Nursing Home, (Respondent).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity employed by the respondent in Southampton, Ontario, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week". (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity, employed by the respondent in Southampton, Ontario, and regularly employed for not more than 24 hours per week, save and except the Director of Nursing and persons above the rank of Director of Nursing". (6 employees in unit). (*Having regard to the agreement of the parties*).

**2337-81-R:** Fur Workers' Union — Local 82 — affiliated with United Food & Commercial Workers' International Union, A.F. of L., C.I.O., C.L.C. (Applicant) v. Fursyn Manufacturing Co. Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, those above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (76 employees in unit). (*Having regard to the agreement of the parties*).

**2341-81-R; 2342-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Belgoma Transportation Limited, carrying on business under the registered style and name of Checker Cab, (Respondent).

Unit #1: "all employees of the respondent working at or out of Sault Ste. Marie, Ontario, save and except supervisors, persons above the rank of supervisor, mechanics, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (60 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent working at or out of Sault Ste. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, mechanics, and office and clerical staff". (30 employees in unit). (*Having regard to the agreement of the parties*).

**2343-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. W. G. Wilson Transportation Inc., carrying on business under the registered style and name of Modern Cab, (Respondent).

Unit: "all employees of the respondent working at and out of Sault Ste. Marie, Ontario, save and except supervisors, and persons above the rank of supervisor". (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2349-81-R:** Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Resortland Hotels Ltd., carrying on business as Anndore Hotel, (Respondent).

Unit: "all office and clerical employees of the respondent employed at the Anndore Hotel in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2352-81-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 721, (Applicant) v. Dutch Masters Group, (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan



Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

**2353-81-R:** International Ladies' Garment Workers' Union, (Applicant) v. Printex (Canada) Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (23 employees in unit). (*Having regard to the agreement of the parties*).

**2354-81-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Delisle Foods Ltd., (Respondent).

Unit: "all employees of the respondent working at or out of its distribution centre in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, and students employed during the school vacation period". (14 employees in unit). (*Having regard to the agreement of the parties*).

**2360-81-R:** Canadian Union of Public Employees, (Applicant) v. Renfrew Public Library, (Respondent).

Unit #1: "all employees of the respondent at Renfrew, Ontario, save and except the chief librarian, persons above the rank of chief librarian, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Renfrew, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the chief librarian, and persons above the rank of chief librarian". (2 employees in unit). (*Having regard to the agreement of the parties*).

**2365-81-R:** Canadian Union of Public Employees, (Applicant) v. Corporation of the Township of Warwick, (Respondent).

Unit: "all employees of the respondent in the Township of Warwick, save and except office and clerical staff, clerk treasurer, road superintendent, chief building official, drainage superintendent, persons above the rank of superintendent, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (5 employees in unit). (*Having regard to the agreement of the parties*).

**2366-81-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Provincial Sanitation Services Ltd., (Respondent).

Unit: "all employees of the respondent working at Oakville, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (30 employees in unit). (*Having regard to the agreement of the parties*).

**2370-81-R:** International Brotherhood of Painters and Allied Trades – Local 1891, (Applicant) v. Old King Painting Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

**2376-81-R:** Canadian Union of Public Employees (Applicant) v. The Catholic Family Service of Ottawa, (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except the executive director, secretary to the executive director, director of professional services and accountant". (20 employees in unit). (*Having regard to the agreement of the parties*).

**2412-81-R:** Public Service Alliance of Canada, (Applicant) v. Douglas N. Cameron Construction Limited, (Respondent).

Unit: "all employees of the respondent at Moose Factory Hospital, Moose Factory, Ontario, save and except the manager and persons above the manager". (27 employees in unit). (*Having regard to the agreement of the parties*).

**2427-81-R:** Canadian Union of Public Employees, (Applicant) v. Leaside Memorial Community Gardens, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Manager, Operations Supervisor and persons above the rank of Manager and Operations Supervisor, Administrative Assistant, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (44 employees in unit). (*Having regard to the agreement of the parties*).

**2434-81-R:** Office and Professional Employees International Union, (Applicant) v. The Children's Aid Society of Hamilton-Wentworth, (Respondent).

Unit: "all employees of the respondent employed in the regional municipality of Hamilton-Wentworth save and except senior accountant, membership secretary, secretary to the comptroller, secretary to the managing director, supervisors, persons above the rank of supervisor". (24 employees in unit). (*Having regard to the agreement of the parties*).

**2440-81-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Concrete Column Clamps (C.C.C.) Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff". (19 employees in unit). (*Having regard to the agreement of the parties*).

**2445-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Myriad Holding Corporation Limited, Hereditary Holdings Limited, and Pyramid Oak Tree Inc., carrying on business under the registered style and name of Evergreen Property Management, (Respondent).

Unit: "all employees engaged in cleaning and maintenance at 700 and 730 Ontario Street, Toronto, Ontario, including resident superintendents, save and except property manager, office and clerical staff". (5 employees in unit). (*Having regard to the agreement of the parties*).

**2454-81-R:** Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. C & M McNally Engineering Inc., (Respondent).

Unit: #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (9 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (9 employees in unit).

**2456-81-R:** Christian Labour Association of Canada, (Applicant) v. Commercial Career Schools Limited, (Respondent).

Unit: “all employees of the respondent at Welland and St. Catharines, save and except admission officers, principals, persons above the rank of principal, office, clerical, custodial and maintenance staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period”. (9 employees in unit). (*Having regard to the agreement of the parties*).

**2481-81-R:** Service Employees Union, Local 478, (Applicant) v. Waldheim Nursing Home Ltd., (Respondent).

Unit: “all registered and graduate nurses regularly employed by the respondent at Huntsville, Ontario, for not more than twenty-four (24) hours per week, save and except the director of nursing, director of nursing in training, persons above the rank of director of nursing, persons covered by subsisting collective agreement”. (2 employees in unit). (*Having regard to the agreement of the parties*).

**2492-81-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Garric Holdings Limited, (Respondent).

Unit: “all employees of the respondent in Kingston, Ontario, save and except foremen, those above the rank of foreman, office and sales staff”. (2 employees in unit). (*Having regard to the agreement of the parties*).

**2494-81-R:** Labourers’ International Union of North America Local 506, (Applicant) v. Village Building Supplies (1977) Ltd., (Respondent).

Unit: “all employees of the respondent in Concord, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff”. (10 employees in unit). (*Having regard to the agreement of the parties*).

**2495-81-R:** Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. York County Hospital Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: “all office and clerical employees of the respondent in Newmarket, Ontario, save and except Supervisors, persons above the rank of Supervisor, Secretary Assistant to the Personnel Director, Executive Assistant to the Executive Director, Methods Analyst, Medical Records Librarians, Payroll Officers, Secretaries to the Assistant Executive Directors, Director of Nursing, Comptroller, persons regularly employed for not more than twenty-four per week, students employed during the school vacation period and those persons covered by subsisting collective agreements”. (82 employees in unit). (*Having regard to the agreement of the parties*).

**2505-81-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. McKeough Sons Company Limited, (Respondent).

Unit: “all employees of the respondent in Sarnia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and those students employed in a co-operative training program”. (3 employees in unit). (*Having regard to the agreement of the parties*).



**2506-81-R:** Ontario Public Service Employees Union, (Applicant) v. District of Parry Sound Child & Family Centre, (Respondent).

Unit: "all employees of the respondent at Parry Sound and Sundridge, Ontario, save and except office manager, persons above the rank of office manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (7 employees in unit). (*Having regard to the agreement of the parties*).

**2510-81-R:** Canadian Paperworkers Union, (Applicant) v. Hunt Canada International, (Respondent).

Unit #1: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (11 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (11 employees in unit). (*Having regard to the agreement of the parties*).

**2517-81-R:** The Carpenters' district Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3327, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. P. D. I. Structure Incorporated, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (3 employees in unit).

**2518-81-R:** International Union of Operating Engineers, Local 796, (Applicant) v. The Cadillac Fairview Corporation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at the Eaton Centre in Metropolitan Toronto engaged in building operations and maintenance, save and except superintendents, persons above the rank of superintendent, retail maintenance and receiving staff, cleaning staff, security staff, office and clerical staff, sales staff, professional engineers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (34 employees in unit). (*Having regard to the agreement of the parties*).

**2536-81-R:** Canadian Union of Public Employees, (Applicant) v. The St. Clair Parkway Commission, (Respondent).

Unit: "all employees of the respondent in the Counties of Lambton and Kent, save and except foremen, persons above the rank of foreman, office and technical employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (19 employees in unit). (*Having regard to the agreement of the parties*).

**2543-81-R:** Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, Division of Ruggles Sales and Service Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial,

commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the geographic Townships of McDougall (including the Town of Parry Sound), Carling Ferguson, McKellar, Christie, Foley and Cowper, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

**2544-81-R:** United Steelworkers of America, (Applicant) v. Diepaume Mines Limited, (Respondent).

Unit: "all employees of the respondent engaged in the development stage of its mining operations in South Porcupine, Ontario, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in the laboratory and in the engineering geological and metallurgical departments, security guards and students employed during the school vacation period". (10 employees in unit).

**2552-81-R:** Bakery, Confectionery & Tobacco Workers' International Union, Local 264, (Applicant) v. Mr. Miller's Oven Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager". (10 employees in unit). (*Having regard to the agreement of the parties*).

**2558-81-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Webpax, A Division of Canadian Cannery Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (86 employees in unit). (*Having regard to the agreement of the parties*).

**2566-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Triple-M-Services Demolition Experts, (Respondents).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

**2602-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Armand Guay Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman”. (3 employees in unit).

**2617-81-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. Presidential Homes, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**2278-81-R; 2279-81-R:** London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Corporation of the County of Elgin, (Respondent).

Unit: “all employees of the Corporation of the County of Elgin at its Terrance Lodge at the Township of Malahide, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff and students the school vacation period”. (24 employees in unit).

Number of persons on list as originally prepared		24
Number of persons who cast ballots		22
Number of ballots marked in favour of applicant	21	
Number of ballots marked in favour of Terrace Lodge Employees’ Association	1	

### **Applications for Certification Dismissed — No Vote Conducted**

**2476-80-R:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent) v. Group of Employees, (Objectors)

**1109-81-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. F.E.D. Construction Company, (Respondent).

**1353-81-R:** International Association of Bridge Structural and Ornamental Ironworkers Local 721 and all other Ontario Locals 700, 736, 765, 786 and Ironworkers District Council of Ontario, (Applicant) v. Folgor Construction Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener #1) v. The Formwork Council of Ontario, (Intervener #2) v. Labourers’ International Union of North America, Local 183, (Intervener #3).

**2074-81-R:** IAM Representatives Association, (Applicant) v. International Association of Machinists and Aerospace Workers, (Respondent).



**2296-81-R:** International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Arrow Painters, (Respondent).

**2344-81-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Donald Wilson carrying on business under the registered style and name of Union Cab, (Respondent).

**2387-81-R:** Ontario Public Service Employees Union, (Applicant) v. Canadian Medical Laboratories Ltd., (Respondent) v. Group of Employees, (Objectors).

**2402-81-R:** Canadian Union of Public Employees, (Applicant) v. City of Nepean, (Respondent).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote:

**0901-81-R:** Canadian Paperworkers Union, (Applicant) v. The Gosselin Lumber Company Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all of its employees working at or out of its sawmill and planning mill operations at Calstock, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff". (47 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		48
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener	32	
Ballots segregated and not counted	1	

**2017-81-R:** Energy and Chemical Workers Union, (Applicant) v. Dow Chemical of Canada Inc., (Respondent).

Unit: "all warehouse employees of the respondent at its Sarnia Division, save and except sub-foremen, persons above the rank of sub-foreman, plant protection men, person regularly employed for not more than 24 hours per week, students employed during the school vacation period and those persons covered under subsisting collective agreements with Energy and Chemical Workers Union Local 672". (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	15	

### Applications for Certification Dismissed Subsequent to a Post Hearing Vote

**1873-81-R:** United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Consumers Distributing Company Limited, (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent employed at the City of Bellville, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (3 employees in unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	0	

Number of ballots marked against applicant	2
Ballots segregated and not counted	1

Unit #2: "all employees of the respondent in the City of Belleville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (11 employees in unit).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	6

**2181-81-R:** United Steelworkers of America, (Applicant) v. Canplas Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent, at Barrie, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	53
Number of persons who cast ballots	49
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	31

**2380-81-R:** Laundry, Dry Cleaning and Dye House Workers International Union, Local 351, (Applicant) v. Admiral Linen Supply Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed for the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week". (38 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	38
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	22

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2076-81-R:** United Brotherhood of Carpenters and Joiners of America Local 1256, (Applicant) v. Curran Contractors Limited, (Respondent).

**2162-81-R:** United Brotherhood of Carpenters and Joiners of America Local 1256, (Applicant) v. 453087 Ontario Ltd. o/a Mar — D Contractors, (Respondent) v. Labourers' International Union of North America, Local 1089, (Intervener).

**2338-81-R:** International Association of Machinists & Aerospace Workers, District Lodge 717, (Applicant) v. Sonara Cosmetics Inc., (Respondent).

**2362-81-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Dunnville Supermarkets Ltd., (Respondent).

**2364-81-R:** Ontario Public Service Employees Union, (Applicant) v. Bruce Peninsula and District Memorial Hospital, (Respondent).

**2409-81-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, (Respondent).

**2426-81-R:** United Brotherhood of Carpenters and Joiners of America Local 2451, (Applicant) v. Ed Belliveau and Sons Ltd., (Respondent).

**2433-81-R:** International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, AFL, CIO, CLC, (Applicant) v. Football Holdings Limited (Roncord Holdings Limited) known as: Domed Stadium, (Respondent).

**2444-81-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Canada Supply and Tire Ltd., (Respondent).

**2446-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Goldlist Property Management, (Respondent).

**2450-81-R:** Directors Guild of Canada, (Applicant) v. Filmtrust Productions Inc., (Respondent).

**2452-81-R:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen — Local #5, London, Ontario, v. Base Construction Incorporated, (Respondent).

**2472-81-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Canadian Cannery Limited, (Respondent).

**2479-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Rino Zanette Limited, Brickwork and Masonry, (Respondent).

**2480-81-R:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. The Corporation of the City of Brockville, (Respondent) v. Canadian Union of Public Employees, (Intervener).

**2603-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Lakehead Roofing and Sheet Metal Co. Ltd. CFT Metal Industries Ltd. Rugged Air, (Respondent).

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**1500-81-R:** United Food and Commercial Workers International Union, Local Unions 175 and 633, (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited, A & P Drug Mart Limited, (Respondents). (*Granted*)

**1929-81-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Applicant) v. R. W. Van Gassen Limited, Doey Gravel and Construction Limited, Rovon Aggregates Limited, Seal-On Paving Ltd. and Poron Trucking & Equipment Ltd., (Respondents). R.E. Van Gassen Limited, Doey Gravel and Construction Limited, and Seal-On Paving Ltd., (*Granted*). Rovon Aggregates Ltd., Roran Trucking & Equipment Ltd., (*Dismissed*).

**1941-81-R:** C.U.P.E., Local 43, (Applicant) v. City of Toronto Non-Profit Housing Corporation, and Corporation of the City of Toronto, (Respondent). (*Dismissed*).



**1960-81-R:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Matassa Contractors Limited; Ampath Construction Company Limited, (Respondents). (*Withdrawn*).

**2486-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 1669, (Applicant) v. Lotysz and Sons Contracting and S. Loytsz & Sons Construction Limited, (*Withdrawn*).

**2508-81-R:** Sudbury Building and Construction Trades Council on its own behalf and on behalf of its member locals: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786, International Brotherhood of Boiler Makers, Iron Ship-Builders, Blacksmiths, Forgers and helpers, Local 128, International Brotherhood of Electrical Workers, Local 1687, International Brotherhood of Painters and Allied Trade, Local 1904, International Union of Bricklayers and Allied Craftsmen, Local 28, International Union of Operating Engineers, Local 793, Sheet Metal Workers International Association, Local 504, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local 800, United Brotherhood of Carpenters and Joiners of America, Local 2486, United Brotherhood of Carpenters and Joiners of America (Millwright Division), Local 1425, (Applicant) v. Campbell Red Lake Mines Limited, Kilborn Limited, Lemay Construction Limited, Peerless Enterprises, and Frankel Steel Ltd., (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**2487-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 1669, (Applicant) v. S. Loytsz & Sons Construction Limited, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1858-81-R:** Elizabeth Shaw, (Applicant) v. Retail, Wholesale and Department Store Union, Local 582 of The Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Respondent) v. K-Mart Canada Limited, (Intervener).

Unit: "all employees including office staff of the respondent at its K-Mart Stores at Sault Ste. Marie, save and except department managers, persons above the rank of department manager, pharmacists and management trainees". (*Granted*).

Number of names of persons on list as originally prepared by employer		118
Number of persons who cast ballots	104	
Number of ballots marked in favour of respondent	27	
Number of ballots marked against respondent	77	

**2087-81-R:** Nick Mastroluisi, (Applicant) v. Amalgamated Clothing and Textile Worker's Union, (Respondent). (*Dismissed*).

**2088-81-R:** Steven R. Denzau, Bruce Denzau, John Miland, (Applicants) v. Canadian Union of Operating Engineers and General Workers, (Respondent).

Unit: "all employees employed by A. E. LePage (Ontario) Limited at its premises at 15 Overlea Boulevard, Toronto, Ontario, save and except foremen and persons above the rank of foreman". (*Granted*).

Number of names of persons on list as originally prepared by employer	3
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Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

**2153-81-R:** Margaret R. Smith, (Applicant) v. Retail Clerks Union, Local 409, (Respondent) v. Domco Foodservices Limited, (Intervener).

Unit: "all employees of the intervener employed at Thunder Bay Airport engaged in the preparation of food save and except Assistant Manager and persons above the rank of Assistant Manager". (*Having regard to the agreement of the parties*). (*Granted*).

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	11

**2171-81-R:** Gerald Seguin, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Lamarre and Son Ambulance Service, (Intervener).

Unit: "all employees of Lamarre and Son Ambulance Service employed in or out of the Counties of Prescott and Russell save and except owner-operator". (*Granted*).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

**2172-81-R:** Norman Beal, (Applicant) v. Teamsters, Chemical Energy and Allied Workers Local Union 441, (Respondent).

Unit: "all employees of E. Harris Company in Metropolitan Toronto save and except foremen, those above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (*Dismissed*).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	1

**2306-81-R:** Nicolas Finney, (Applicant) v. United Electrical, Radio and Machine Workers of America (UE), (Respondent) v. RCA Inc., (Intervener).

Unit: "all office, clerical and technical employees of RCA Inc. employed at its plant in Midland, save and except Foremen and Administrators, persons above the rank of Foremen and Administrators, members of the Association of Professional Engineers of Ontario performing work comparable to Technical Associate I and II and Engineering Specialist II and III, Secretary to the Plant Manager, Secretary to the Manager of Financial Operations, Secretary to the Manager of Quality and Reliability, Field Engineer, plant medical staff, students employed during the school vacation periods, students employed during cooperative work terms and persons covered by existing collective agreements". (*Granted*)

Number of names of persons on list as originally prepared	113
Number of persons who cast ballots	92
Number of ballots marked in favour of respondent	30
Number of ballots marked against respondent	62

**2340-81-R:** Spencer C. Elofson, (Applicant) v. Sudbury Mine, Mill and Smelter Workers Union, Local 598, (Respondent). (*Dismissed*).

**2377-81-R:** Barb Ciach, Don Embleton, Laila Owen, Keith Taylor, (Applicant) v. United Electrical, Radio and Machine Workers of America, Local 520, (Respondent) v. Inglis Limited, (Intervener). (*Dismissed*).

## **REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER**

**2270-81-M:** The Board of Education for the City of Toronto, (Applicant) v. International Brotherhood of Electrical Workers, Local 353, (Trade Union). (*Granted*)

**2271-81-M:** The Board of Education for the City of Toronto, (Applicant) v. Toronto-Central Ontario Building and Construction Trades Council, (Council). (*Granted*).

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE**

**2532-81-U:** Steinberg Inc. (Miracle Food Mart Division), (Applicant) v. Eric Maurins et al, (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY**

**2457-81-U:** Comstock International Ltd., (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800, Mike Zangari and Edgar Yelle, (Respondents). (*Granted*).

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT**

**2318-81-U:** Motion Picture Projectionists' Union, Local #582, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada. (I.A.T.S.E.), (Applicant) v. Capitol Theatre, Woodstock Ont., and Mr. Tom Naylor, (Respondent). (*Withdrawn*).

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**0791-80-U:** Ontario Nurses' Association, (Complainant) v. The St. Catharines General Hospital, (Respondent). (*Dismissed*).

**2292-80-U:** Suzanne Hebert-Vaillant, (Complainant) v. Canadian Union of Public Employees Local 2327, (Respondent). (*Granted*).

**2478-80-U:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CIC, AFL, CIO), (Complainant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).



**0197-81-U:** Stanley Dwyer, (Applicant) v. United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. — International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. Local 1285, (Respondent), v. Chrysler Canada Limited, (Intervener). (*Dismissed*).

**1623-81-U:** Ontario Nurses' Association, (Applicant) v. Homewood Sanitarium of Guelph, Ontario Ltd., (Respondent). (*Granted*).

**1652-81-U:** John Cecil Watson, (Complainant) v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Respondent) v. Consolidated Fastfrate Limited, (Intervener). (*Dismissed*).

**1666-81-U:** International Woodworkers of America, Local 2-600, (Complainant) v. Amoco Fabrics Ltd., (Respondent). (*Dismissed*).

**1736-81-U:** Fur, Leather, Shoe & Allied Workers Union Local 82, (Complainant) v. C.N. Shoes Co. Limited, (Respondent), (*Granted*).

**1920-81-U:** Harbhajan Nagra, (Complainant) v. United Steelworkers of America, (Respondent) v. The Continental Group of Canada Ltd., (Intervener). (*Dismissed*).

**1927-81-U:** McKenly Daley, (Complainant) v. The Amalgamated Transit Union, Local 1572, (Respondent) v. The Corporation of the City of Mississauga, (Intervener). (*Dismissed*).

**1943-81-U:** Mechanical Contractors Association of Sarnia, (Complainant) v. Mechanical Contractors Association of Ontario, (Respondent) v. Industrial Contractors Association of Canada, (Intervener). (*Granted*).

**1977-81-U:** Canadian Union of Public Employees, Local 79, (Complainant) v. The Municipality of Metropolitan Toronto, (Respondent). (*Withdrawn*).

**2039-81-U:** Toronto Motion Picture Projectionists' Union, Local 173, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada (Complainant) v. 365414 Ontario Ltd., carrying on business as the Coronet Theatre and Hugo Albel, (Respondents). (*Granted*).

**2040-81-U:** Toronto Motion Picture Projectionists' Union, Local 173, of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, (Complainant) v. 365414 Ontario Ltd., Hugo Albel and LaSalle Cunningham, (Respondents). (*Granted*).

**2152-81-U:** Steven R. Denzau, Bruce Denzau, John Miland, Canadian Union of Operating Engineers & General Workers, (Complainants) v. Canadian Union of Operating Engineers and General Workers, A.E. LePage (Ontario) Limited, (Respondents). (*Dismissed*).

**2189-81-U:** Ed Finn, John McNevin, Dewey Merrett, and J. A. Mollins, (Complainants) v. Don Nicholson and Canadian Brotherhood of Railway Transport and General Workers. (Respondent). (*Withdrawn*).

**2220-81-U:** The International Beverage Dispensers' Union, Local 280, (Complainant) v. Movel Restaurants Limited, c.o.b. as Movenpick Restaurants of Switzerland, (Respondent). (*Withdrawn*).

**2246-81-U:** Darshan Sidhu, (Complainant) v. United Steel Workers of America, Local 8614, (Respondent) v. Court Galvanizing Limited, (Intervener). (*Withdrawn*).

**2247-81-U:** Malkiat Singh Jassal, (Complainant) v. United Steel Workers of America, Local 8614, (Respondent) v. Court Galvanizing Limited, (Intervener). (*Withdrawn*).

**2277-81-U:** Whitby Boat Works Limited, (Complainant) v. The United Brotherhood of Carpenters and Joiners of America and its Local Union 2679, (Respondent). (*Withdrawn*).

**2294-81-U:** Retail, Commercial & Industrial Union Local 206 chartered by the United Food & Commercial Workers International Union, (Complainant) v. St. Hubert Bar-B-Q. Ltd., (Respondent). (*Withdrawn*).

**2324-81-U:** Dennis Weaver, (Complainant) v. J. Cameron Nelson and Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers Local 304, (Respondent) v. Canada Malting Co. Ltd., (Intervener). (*Dismissed*).

**2328-81-U:** International Ladies' Garment Workers Union, (Complainant) v. The Signal Shirt Company Limited, (Respondent). (*Withdrawn*).

**2335-81-U:** Gordon W. Irvin, (Complainant) v. Fred Collver, (Respondent). (*Withdrawn*).

**2339-81-U:** The Canada Metal Company Ltd., (Complainant) v. Energy and Chemical Workers Union, Local 2, (Respondent). (*Dismissed*).

**2358-81-U; 2359-81-U:** United Electrical, Radio & Machine Workers of America, (UE), (Complainant) v. Matsushita Industrial Canada Limited, (Respondent). (*Withdrawn*).

**2363-81-U:** United Food and Commercial Workers International Union, Local 175, (Complainant) v. Dunnville Supermarkets Ltd., (Respondent). (*Withdrawn*).

**2371-81-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Packaging Group of Domtar Inc. — Recycling Division, (Respondent). (*Withdrawn*).

**2372-81-U:** Steve Varga, (Complainant) v. Dresser Industries, Canada, Ltd., (Respondent) v. United Steelworkers of America, (Intervener). (*Withdrawn*).

**2375-81-U:** Denis-Guerin, (Complainant) v. Labourers' International Union of North America, (Respondent). (*Withdrawn*).

**2383-81-U:** Ontario Nurses' Association, (Complainant) v. St. Mary's General Hospital, (Respondent). (*Dismissed*).

**2388-81-U:** Canadian Union of Public Employees and its Local 1370, (Complainant) v. Little's Nursing Home (Essex) Ltd., Mr. G. Docherty, (Respondent). (*Withdrawn*).

**2401-81-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. I.T.T. Grinnell Division of I.T.T. Industries of Canada Limited, (Respondent). (*Withdrawn*).

**2403-81-U:** Peter Mueller, (Complainant) v. C.U.P.E., Local 190, (Respondent). (*Withdrawn*).

**2418-81-U:** Lorraine Ratsoy, Jay Nelson, Pam, (Complainants) v. Henke J. de Zoete Ont. Representative CLAC, (Respondent). (*Withdrawn*).

**2431-81-U:** Alex Vahderteems, (Complainant) v. Canadian Union of Operating Engineers and General Workers, Loc. 101, (Respondent). (*Withdrawn*).

**2466-81-U:** William Fitzpatrick, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

**2468-81-U:** David Murphy, (Complainant) v. Labourers Union Local 1267, 30 Drewry Avenue, (Respondent). (*Withdrawn*).

**2469-81-U:** Angel A. Luge, (Complainant) v. Laborers' Union Local 1267, 30 Drewry Avenue, Willowdale, Ontario Suite 503 — 2229600, (Respondent). (*Withdrawn*).

**2470-81-U:** Dere T. Dabor, (Complainant) v. Local No. 1267, (Respondent). (*Withdrawn*).

**2502-81-U:** Little's Nursing Home (Essex) Limited, (Complainant) v. Canadian Union of Public Employees and its Local 1370 (Madeline Anderson — National Representative CUPE Windsor Area Office), (Respondent). (*Withdrawn*).

**2516-81-U:** Ontario Hydro, (Complainant) v. Those Persons in Attachment "A" on Their Own Behalf and in Their Capacity as Union Officials, and United Association of Journeymen and Apprentices of the Plumbing and Fitting Industry of the United States and Canada and its Local 628, (Respondents). (*Withdrawn*).

**2533-81-U:** International Union of Operating Engineers, Local 796, (Complainant) v. Hillel Lodge, (Respondent). (*Withdrawn*).

**2538-81-U:** Steinberg Inc. (Miracle Food Mart Division), (Complainant) v. Eric Maurins and the employees listed in schedules "A", "B" and "C" attached, (Respondents). (*Withdrawn*).

**2541-81-U:** Richard Williams, (Complainant) v. The Union Executive of Local P688 of the United Food and Commercial Workers International Union, (Respondent). (*Withdrawn*).

**2548-81-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. Smiths Falls Community Hospital, (Respondent). (*Withdrawn*).

**2578-81-U:** Allan Heath, (Complainant) v. James O'Mara, President of the Canadian Paperworkers Union, Local 304, Reed Decorative Products Limited and the Canadian Paperworkers Union, (Respondents). (*Withdrawn*).

**2600-81-U:** United Brotherhood of Carpenters & Joiners of America, Local Union 2041, (Complainant) v. Triple-L-Construction Limited, (Respondent). (*Withdrawn*).

**2609-81-U:** United Steelworkers of America, (Complainant) v. Falconbridge Nickel Mines Limited, (Respondent). (*Withdrawn*).

**2634-81-U:** Charles Beamish, (Complainant) v. International Brotherhood of Painters & Allied Trades, Local Union 1904, (Respondent). (*Withdrawn*).

**2688-81-U:** Calogero Falletta, (Complainant) v. Bernard O'Connor of Canadian Dressed Meats, (Respondent). (*Withdrawn*).



## APPLICATIONS FOR RELIGIOUS EXEMPTION

**1078-81-M:** John M. Goodings, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

**2101-81-M:** Selina Bauman, (Applicant) v. Local Union 2345 of the International Brotherhood of Electrical Workers, (Respondent Trade Union) v. Johnston Soper Division Designed Power Ltd., (Respondent Employer). (*Granted*).

## JURISDICTIONAL DISPUTES

**0222-81-JD:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, (Complainant) v. Eric & Ed Welding Contractors; International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0892-80-M:** Canadian Union of Public Employees and its Local 87, (Applicant) v. The Corporation of the City of Thunder Bay, (Respondent). (*Partially Granted*).

**1337-81-M:** Grey-Owen Sound Homes for the Aged (Lee Manor), (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

**2044-81-M:** Local Union 2345 International Brotherhood of Electrical Workers, (Applicant) v. Noranda Metal Industries Ltd., (Respondent). (*Granted*).

**2132-81-M:** Canadian Union of Public Employees and its Local #1953, (Applicant) v. Aurora Public Library Board, (Respondent). (*Terminated*).

**2183-81-M:** London Public Library Board, (Applicant) v. The London Library Employees' Union, Local 217, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1216-81-OH; 1261-81-OH:** Walter Doupagne, (Complainant) v. Baltimore Aircoil of Canada, (Respondent). (*Dismissed*).

**2322-81-OH:** Bessie Lymberopoulos, (Complainant) v. Sun Polishing and Plating Limited, (Respondent). (*Withdrawn*).

**2356-81-OH:** Mr. James M. Gordier, (Complainant) v. Mr. Ted Lammin of Exide Canada Ltd., (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**1321-80-M:** Sinclair Welding Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Dismissed*).

**1437-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inducon Construction (Northern) Inc., Inducon Development Corporation, Inducon Construction of Canada Limited, Desbil Management Inc. and Inucon Design/Build Associates, (Respondents). (*Granted*).

**1549-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Lloyd Bondy Trucking & Excavating Ltd., (Respondent). (*Granted*).

**0252-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, (Applicant) v. Eric & Ed Welding Contractors (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Intervener). (*Withdrawn*).

**1186-81-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Doug Wright Construction Ltd., (Respondent). (*Withdrawn*).

**1604-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Lloyd Bondy Trucking & Excavating Ltd., (Respondent). (*Granted*).

**1612-81-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Hugh M. Grant Limited, and The Clarkson Company Limited as receiver and manager of Hugh M. Grant Limited, (Respondents). (*Granted*).

**1712-81-M:** United Brotherhood of Carpenters & Joiners of America, Local Union 446, (Applicant) v. Belanger Construction Limited, (Respondent). (*Withdrawn*).

**1866-81-M:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Francis Hankin and Company Limited, (Respondent). (*Withdrawn*).

**1867-81-M:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Proweld Company Limited, (Respondent). (*Granted*).

**1959-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Matassa Contractors Limited; Ampath Construction Company Limited, (Respondents). (*Withdrawn*).

**2140-81-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Canada Wide Insulations, (Respondent). (*Granted*).

**2173-81-M:** I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788, (Applicants) v. Ontario Hydro, (Respondent). (*Withdrawn*).

**2222-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Roman Plastering & Acoustical Co., (Respondent). (*Withdrawn*).

**2250-81-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Canada Wire Insulations, (Respondent). (*Granted*).

**2254-81-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. St. Catharines Insulation Ltd., (Respondent). (*Granted*).

**2274-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 685, (Applicant) v. Steinberg Inc., (Respondent). (*Withdrawn*).

**2305-81-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenter and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

**2314-81-M:** Carpenters' District Council Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Canadian Caulking & Weatherstripping, (Respondent). (*Withdrawn*).

**2326-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Rexdale Carpentry Limited, (Respondent). (*Withdrawn*).

**2346-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Econo Excavating and Paving Co. Ltd., (Respondent). (*Withdrawn*).

**2351-81-M:** United Association, Local 800, (Applicant) v. Northway Industries of Balfour Ltd., (Respondent). (*Withdrawn*).

**2368-81-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Acadian Acoustics Co. Limited, (Respondent). (*Withdrawn*).

**2369-81-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Downsview Dry Wall Limited, (Respondent). (*Withdrawn*).

**2374-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Finley McLachlan Construction Ltd., (Respondent). (*Withdrawn*).

**2384-81-M:** I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788, (Applicants) v. Ontario Hydro, (Respondent). (*Withdrawn*).

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**2424-81-M; 2425-81-M:** The United Association of Journeymen and Pipe fitting Industry of the United States and Canada — Local Union 628, (Applicant) v. Clow Darling Mechanical Ltd., (Respondent). (*Withdrawn*).

**2430-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 527, (Applicants) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Withdrawn*).

**2435-81-M:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 1669, (Applicant) v. Busch's Machine Welding, (Respondent). (*Withdrawn*).

**2441-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local 46, (Applicant) v. Eastern Canada Contractors Ltd., (Respondent). (*Granted*).



**2443-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Givan Construction Ltd., (Respondent). (*Granted*).

**2458-81-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Granted*).

**2459-81-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Vanis Masonry Construction Co. Ltd., (Respondent). (*Granted*).

**2485-81-M:** International Brotherhood of Electrical Workers Local 894, and the International Brotherhood of Electrical Workers Construction Council of Ontario, (Applicant) v. J. Lettner Contractors Limited and The Oshawa-Port Hope Electrical Contractors Association, (Respondents). (*Withdrawn*).

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**2537-81-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Future Material Services, (Respondent). (*Withdrawn*).

**2549-81-M:** International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local Union (1684), (Applicant) v. Joseph Zuliani Limited carrying on business as Zuliani Glass, (Respondent). (*Withdrawn*).

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**2590-81-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. R. L. Wilson Engineering and Construction Ltd., (Respondent). (*Granted*).

**2594-81-M:** Operative Plasterers and Cement Masons; International Assoc. of the United States and Canada, Local 598, (Applicant) v. 391341 Ontario Limited c.o.b. as Tomar Construction, (Respondent). (*Granted*).

**2595-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*).

**2614-81-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, on behalf of member, Jacko Perisa, (Applicant) v. A. G. Baird Ltd., (Respondent). A. G. Baird Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0212-81-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. A. J. Bus Lines Ltd., (Respondent) v. Group of Employees, (Objectors). (*Granted*).

**1786-81-JD:** Labourers' International Union of North America, and Labourers' International Union of North America, Local 1059, (Complainants) v. Ontario Hydro, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, (Respondents). (*Denied*).

## APPLICATIONS FOR RIGHT TO ACCESS

**2507-81-M:** Sudbury Building and Construction Trades Council on its own behalf and on behalf of its member locals: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786, International Brotherhood of Boiler Makers, Iron Ship-Builders, Blacksmiths, Forgers and helpers Local 128, International Brotherhood of Electrical Workers, Local 1687, International Brotherhood of Painters and Allied Trade, Local 1904, International Union of Bricklayers and Allied Craftsmen, Local 28, International Union of Operating Engineers, Local 793, Sheet Metal Workers International Association, Local 504, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local 800, United Brotherhood of Carpenters and Joiners of America, Local 2486, United Brotherhood of Carpenters and Joiners of America, (Millwright Division), Local 1425, (Applicant) v. Campbell Red Lake Mines Limited, Kilborn Limited, Lemay Construction Limited, Peerless Enterprises, and Frankel Steel Ltd., (Respondents). (*Granted*).

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**1263-81-OH Brenda E. Beattie, Complainant, v. Auto Jobbers Warehouse Ltd., Respondent**

**Health and Safety – Reconsideration – Employer not represented by counsel at initial hearing – Not adducing relevant evidence before Board – Reconsideration not for repairing deficiencies of party’s case – Whether reliance on safety inspector’s report relevant factor – Whether reliance on labour relations officer’s opinion causing Board to reconsider – Secrecy of settlement discussions**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J.A. Ronson and F. Cooke.

**APPEARANCES:** *Brenda E. Beattie for the complainant; Lisa McCullough for the respondent.*

**DECISION OF VICE-CHAIRMAN IAN SPRINGATE, AND BOARD MEMBER F. COOKE; May 5, 1982**

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*. In a decision dated December 29, 1981, the Board concluded that the complainant, Miss Brenda Beattie, had been dismissed contrary to section 24(1) of the Act in that she had been dismissed for refusing to drive a vehicle which she reasonably believed to be unsafe. The Board directed that the respondent compensate Miss Beattie. The matter was subsequently relisted for hearing to deal with a request from the respondent that the Board reconsider its decision of December 29, 1981, and also to settle the amount of compensation owing to Miss Beattie.

2. In large measure the request for reconsideration is based upon the submission that the respondent should have been able to rely on the report of an inspector called in by Miss Beattie after she had been laid-off. The inspector in his report stated that “no violations of the Act were noted”. As we indicated in our decision of December 29, 1981, one would generally expect that the report of an inspector would settle a matter such as this. Such was not the case here, however. The evidence led before us indicated that in the presence of Miss Beattie the inspector did not carry out any meaningful investigation of the vehicle. Accordingly, we concluded that Miss Beattie’s reasonable belief that the vehicle was unsafe was not made any less reasonable by the release of the inspector’s report. It is indeed unfortunate if the respondent felt that it could rely totally on the inspector’s report. However, sections 23 and 24 of the Act are clearly meant to provide protection to employees who refuse to operate equipment they believe to be unsafe. The actions of the inspector cannot, in our view, serve to deprive Miss Beattie of the protections of those sections. In addition, in that Miss Beattie filed her complaint subsequent to the release of the inspector’s report, the respondent should have been on notice that Miss Beattie was adopting the position that the inspector’s report was not determinative of the matter. Given those considerations, we are not prepared to vary or revoke our decision of December 29, 1981, in response to the claim that the respondent should have been able to rely on the inspector’s report.

3. Although the respondent was represented by counsel at the hearing into the request for reconsideration, it was not represented by counsel when Miss Beattie’s complaint was heard on its merits. In support of the request for reconsideration, counsel submitted that during the initial hearing the Board had not been appraised of the true facts relevant to the proceedings, and accordingly the respondent now desired to put certain additional evidence before the Board. Counsel submitted that the Board should entertain this additional evidence in that the respondent had not felt a need to retain counsel prior to the initial hearing primarily because of its belief that it could rely on the report of the inspector. We are unable to accept



this submission. The parties were advised that the initial hearing was for the purpose of hearing the evidence and representations of the parties with respect to the complaint. Further, it is not contended that the evidence the respondent now seeks to call was not available to it at the time of the initial hearing. Prior to the initial hearing, the respondent apparently did an assessment of the merits of the complaint and, on the basis of that assessment, decided not to retain counsel. In our view it is not open for the respondent to now seek to have the matter relitigated this time with the assistance of counsel. We do not believe that the Board's reconsideration power was intended to be exercised for the purpose of permitting a party to repair the deficiencies of its case. Indeed, if such were the practice, proceedings before the Board would be interminable and decisions inconclusive.

4. The respondent's final grounds for seeking reconsideration, and the opportunity to lead additional evidence, is based on a claim that one of the Board's Labour Relations Officers advised Mr. Vandenberg, an official of the respondent, that Miss Beattie had a very poor case. At the hearing, counsel for the respondent contended that it was in part due to this comment that the respondent did not retain counsel and did not prepare fully for the hearing, in consequence of which not all of the relevant facts were put before the Board. Upon the filing of the complaint the Board, in accordance with its practice in such matters, appointed an officer to endeavour to effect a settlement of the complaint. The Board's long standing practice is to treat settlement discussions between its officers and the parties to a complaint as privileged and confidential, and not to entertain evidence with respect to those discussions. This is done with a view to protecting the integrity of the settlement process and encouraging parties to engage in frank settlement discussions free from concerns that statements made during those discussions might subsequently become known to the Board panel hearing the case on its merits. In the instant case, we are satisfied that it would not be practicable to try to deal with the alleged statement by the officer in isolation from the remainder of the settlement discussions since the context within which the alleged statement was made would also be relevant to the contention being advanced by the respondent. For example, if the matter was gone into and it appeared that the alleged statement was in fact made, but that it was made in whole or in part on the basis of information supplied by the respondent to the Officer, one would be hard pressed to keep out evidence as to what it was that the respondent told the Officer. Further, in order to assess the reasonableness of the respondent relying on the Officer's opinion as to the merits of Miss Beattie's case, one would want to know whether the Officer advised the respondent of how Miss Beattie viewed the matter. Also relevant would be whether, on the basis of later discussions with both sides, the Officer gave the respondent a revised estimate of the merits of the case. By the conclusion of a hearing into these and other related issues connected to the alleged statement, it is highly likely that practically all of the settlement discussions would have been gone into. In our view, the result would be to effectively destroy the privilege attaching to settlement discussions with an officer. As of yet, the Board has not heard any evidence as to whether or not the Officer actually made the comment complained of, and we are satisfied that the respondent should not be given an opportunity to adduce any such evidence.

5. Before leaving this matter, it is to be noted that the terms of the Officer's appointment, together with the formal Notice of Hearing, put both parties on notice that the Officer's role was limited to the settlement process, and that if no settlement could be reached, a hearing would be held before the Board for the purpose of hearing the evidence and representations of the parties with respect to the complaint. Accordingly, the respondent should have been aware that once the matter was put before the Board for a determination, the opinions of the Officer would not be of any relevance.

6. Having regard to our reasoning set out above, we decline to revoke or vary our decision of December 29, 1981.

7. As for the amount of compensation payable to Miss Beattie, both parties agreed that the amount involved would be in the area of \$2,000.00, and that the Board should calculate the actual amount. On the material before us, we fix the amount including interest, at \$2,133.00. Accordingly, we direct the respondent to now pay Miss Beattie the sum of \$2,133.00.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. The complainant, Ms. Beattie, drove a delivery truck for the respondent employer. She returned the truck to the employer's yard one day and complained that the windshield wipers and the brakes on the vehicle did not work properly. She refused to drive the truck because it was unsafe. The employer said the truck was safe, and, in the face of Ms. Beattie's refusal, sent her home.

2. In due course, an inspector from the Ministry of Labour came out to inspect the truck pursuant to the provisions of the *Occupational Health and Safety Act*. Following his attendance the inspector issued a report which contained the statement, "No contraventions of the Act were noted." Unfortunately the inspection was not carried out in compliance with section 23 of the *Occupational Health and Safety Act*, but the employer did not know that or of the consequences. It relied on the report as vindicating its position from the outset.

3. Ms. Beattie also stuck to her guns. Nothing had happened to convince her that the truck was safe to drive, so she still refused to drive it and remained at home. She remained off work for more than three months before bringing her complaint to this Board. Following a hearing at which neither party was represented by counsel, the Board awarded Ms. Beattie some eight weeks wages by way of damages as against her employer.

4. Needless to say the employer was upset at the award made against it as a result of circumstances which it considered quite beyond its control. It retained counsel and requested a reconsideration. The request for reconsideration reads:

"I have been retained by Auto Jobbers Warehouse Ltd. regarding this matter. After having carefully reviewed the decision of the Ontario Labour Relations Board, dated December 29, 1981, and in view of Section 106(1) of The Labour Relations Act, I would like to make several submissions to you at this time.

My client would like this decision re-considered on the basis of four issues. The first issue is that of the inspection of the motor vehicle by the employer in the presence of Brenda Beattie. The second issue is that of Miss Beattie's being laid off. The third issue is that of the actions of the inspector from the Ministry of Labour's Occupational Health and Safety Division. The fourth issue is that of the reliance of Auto Jobbers on the information obtained from the Labour Relations Officer.

According to Section 23(4) of the Occupational Health and Safety Act,

the employer must investigate the employee's report in the presence of the employee. This was done with respect to the windshield wipers.

In fact, Miss Beattie was still in her vehicle when Siegfried Rogge, a Class A Mechanic, fixed the wipers on the truck. This took only a few minutes as only a wire had come off and he merely put it back on. With respect to the brakes, they were new and Mr. Jack Vandenberg immediately took the vehicle out on the road and found nothing wrong with the brakes. It is admitted that Mr. Vandenberg cannot remember whether Miss Beattie actually saw him take out the vehicle. As a result of this lack of memory, it is conceded that Section 23(4) could have been breached with respect to the brakes.

The issue of being laid off as a result of the refusal to work has been totally misunderstood. Miss Beattie returned to the Respondent's premises after having been off for approximately 4 weeks as a result of a back problem, which was not related to the job. When she returned, she was offered the old truck which she had driven previously, but she could not drive it because she could not lift the heavy objects involved. There were several witnesses present when this offer was made. With respect to the statements that there were several junior employees working and one summer student, this is totally untrue. There was one junior employee who was driving a truck which required heavy articles to be picked up. Also, there was one summer student. However, this summer student had been hired every year for 4 years, when the most senior driver, a senior pensioner, left on his vacation every summer. Miss Beattie had been employed for less than one year, and this student had been returning every year for 4 years.

Due to her back condition, there simply was not any alternative that the company could offer her at this time. Miss Beattie phoned the offices of Auto Jobbers herself, on or about August 20, 1981, and asked for her severance pay and vacation pay because she stated that she was going out west to become a pilot truck driver in Edmonton. Thus, she was not dismissed because of her refusal to work, as she already had another job.

The third issue is that of the inspector who came and wrote out a report stating that there were no contraventions of the Act, to be noted in this case. One cannot dismiss the comment of the Vice-Chairman in this decision who stated:

'One would expect that the report of an inspector would settle a matter such as this.'

If an employer cannot listen to the advice of an inspector who is employed by the Occupational Health and Safety Division, then where lies his remedy? It appears that the Board's interpretation of the inspector's function in the Occupational Health and Safety Act is so patently unreasonable that it could be a case for judicial review. As



Justice Reid pointed out in *Re Hughes Boat Works Inc. and UAW* 26 O.R. (2d) 420, at page 432:

'It must be a matter of real significance to a tribunal whether a possible interpretation leads to practical or impractical consequences in the field of activity it is called on to supervise.'

If the employer cannot rely on the inspector sent out by the Ministry of Labour, then the consequences of this legislation would be totally impractical, because the employer would constantly have to "second guess" the report of the inspector.

The Board indicated in its decision in paragraph 13 that there had been no meaningful inspection of the vehicle. It is totally unreasonable that the employer should be responsible for the irresponsible actions of a government inspector. Also, this vehicle was found to be safe by this inspector and likewise by other employees who work for Auto Jobbers. The most senior employee, the pensioner mentioned above, drove this vehicle regularly, right up to the time of the incident with Ms. Beattie and Ms. Brenda Fell drove it immediately afterwards.

The fourth issue is that of the reliance by Auto Jobbers on the information that it obtained from the Ontario Labour Relations Board Officer. When (name deleted) Labour Relations Officer, was sent out to meet with Mr. Jack Vandenberg, the meeting lasted approximately 15 minutes and Mr. Vandenberg was advised that the hearing at the Labour Board would only be a mere formality because (name deleted) stated that Ms. Beattie's case was very poor and that (he/she) was doing (his/her) best to dissuade her from proceeding with it at the Labour Board. As Mr. Vandenberg is a lay person who wanted to conduct his business without incurring unnecessary legal costs, he relied on information of (name deleted) and proceeded to the hearing, which took approximately 1/2 hour and the result was the decision of December 29, 1981.

It must be emphasized that Ms. Beattie was not fired wrongly. In fact she informed Auto Jobbers that she had found a job out west in August. As a result, the penalty of \$2,000.00 is totally excessive and should be reconsidered under Section 106(1) of the Labour Relations Act.

Also, the action of the inspector should definitely be investigated before any further action with respect to enforcement is taken. We acknowledge receipt of your letter of January 27, 1982, and the enclosed Notice of Hearing.

Would you kindly advise us whether we may have this decision reconsidered in order that it may be varied or revoked. Employers must be able to rely on inspector's reports in order that the Occupational Health and Safety Act not be rendered worthless.

On the basis of the four issues outlined above, my client would like to have this decision of the Board re-considered at your earliest convenience. Would you kindly inform us of your intention as soon as possible.

Yours very truly,  
SNOBELEN, McCULLOUGH"

In order to be fair to the reputation of the Officer, and because the majority have ruled against hearing evidence about the alleged statements, I have deleted the Officer's name.

5. Dealing shortly with the third issue raised in the letter, i.e., reliance on the inspector's report, the Board has held that there is no absolute protection to an employer by virtue of an inspector's report. (See, *Inco Metals Co.; Re R. Pharand, et al.*, [1980] OLRB Rep. July 981). It may well be that employers will have to constantly "second-guess the report of the inspector", but the Board has interpreted the *Occupational Health and Safety Act* to that effect.

6. The remaining issues raised by the letter are to my mind interrelated. The employer is saying that it relied on the statements made by the Labour Relations Officer to its detriment. It did not retain counsel to advise it of the issues which would be of concern to the Board and of the relevant evidence to be presented. Again, it was sheltering behind the inspector's report and the Officer's statements could only reinforce the employer's understanding of its legal position.

7. I do not think that section 111(6) of the Act affords any protection to the Officer in this case. That section does not speak to statements made by an officer (for comparison see the protection afforded by section 111(4)). So the issue is whether the statements made by the officer during settlement discussions (if that is in fact what they were in this case) should be treated as privileged by the Board.

8. Settlement discussions with the involvement of a Labour Relations Officer are encouraged by the Board. They are encouraged to the extent that many complaints are delivered to the respondents personally by officers. The settlement rate in the cases before it justifies the Board's pride in the role of its officers. The officer's role is a sensitive, delicate and difficult one. It is very easy for a party caught up in the heat and excitement of the dispute to hear what he or she wants to hear. It is especially so where the officer is dealing with a party unrepresented by counsel, and who may well view the officer not as a settlement officer *per se*, but as an extension of the Board.

9. Counsel for the employer submitted that the employer did not retain counsel for the first hearing because of the statements made by the Officer. In that context it seems to me to boil down to this: If the statements were in fact made as alleged, would the employer have an arguable case for a re-hearing? From what I understand of the concept of natural justice, I think it would. I would order that the employer be allowed to lead its relevant evidence concerning the allegations so that the Board may proceed to determine if the employer was accorded a full and fair hearing.

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**2462-81-M Canadian Union of Public Employees Local 115, Applicant,  
v. The Corporation of the City of Brockville, Respondent**

**Employee Reference – Practice and Procedure – Board appointing officer to inquire into changes in duties and responsibilities – Finding by Board that individuals “employees” not determinative of whether they are within bargaining unit**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;** May 21, 1982

1. This is an application under section 106(2) of the *Labour Relations Act*.
2. The parties are currently covered by a collective agreement having a term January 1, 1981 to December 31, 1982.
3. Having regard to the Board’s policy as articulated, for example, in *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572, the Board appoints an officer to inquire into and report to the Board on changes in the duties and responsibilities of the following persons since the collective agreement was entered into:

Gerald Leeder	Stock Clerk
Bonnie Fitzgerald	Dispatcher
Bill Fyckes	Foreman
Doug Lozo	Foreman
Harold Dunster	Foreman
Russ Fraser	Foreman
Jim Graham	Foreman
Rick Raymond	Assistant Supervisor of Operations
Dennis Irvine	Cemetery Attendant

and also on who the employer of Dennis Irvine is.

4. The Board notes that a finding under section 106(2) that any of the above persons are “employees” for the purpose of the Act will not necessarily dispose of the question whether they are employees falling within the scope of the applicant’s bargaining unit.

**DECISION OF BOARD MEMBER OLIVER HODGES;**

1. I dissent.
2. The Board is required by section 6 of the Act to determine a unit of employees appropriate for collective bargaining. the duties and responsibilities of employees are usually examined by a Board Officer when the parties disagree as to the employee status of person(s), in the course of the certification process. In certain circumstances, however, the Board will conduct the examination itself at the certification hearing. The Board then decides whether the person(s) in dispute are employees within the appropriate bargaining unit, based on the report of the Board Officer.



3. In my opinion section 106(2) is an extension of the certification process. The plain answer in this case as sought by the applicant is in fact whether the persons whose duties and responsibilities appear to have been changed are now employees within the scope of the bargaining unit. If the alleged change is proven before the Board to a degree sufficient to merit the determination being sought, I would take the additional step necessary to resolve the dispute *in toto*.

4. In my opinion section 6 and section 106(2) together mandate the Board to completely decide the questions referred under section 106(2). The added step required to place persons whose employee status is established by the Board within the scope of the bargaining unit (or to exclude them therefrom), should in my opinion issue as a Board order. In the instant case the direction would be:

- (a) to include the employee in the unit were this an all-employee unit, or
- (b) to amend the bargaining unit description as may be required to give effect to the Board order.

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## **2613-81-R Ontario Public Service Employees Union, Applicant, v. Bruce Peninsula & District Memorial Hospital, Respondent**

**Bargaining Unit – Certification – Application pertaining to employees of respondent hospital – Respondent attempting to include another hospital outside municipal boundary in unit – Relying on common control and employee interchange – Disruption to respondent minimal – Board not granting wider unit**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and H. Simon.

**APPEARANCES:** *Barbara Linds for the applicant; Judith Clarkson, Peter Walker and Maria Simmie for the respondent.*

### **DECISION OF THE BOARD; May 3, 1982**

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The application has been brought with respect to the “part-time” unit of support staff at the respondent’s Hospital in Wiarton. The applicant was certified in August of 1981 as bargaining agent for the “full-time” support staff unit at the same Hospital. The respondent argued at that time that the appropriate bargaining unit would include the employees of Earl R. Harris Memorial Hospital located at Lion’s Head, some twenty-five miles from Wiarton.

Earl Memorial at that point in time was operated by the Red Cross Society, but plans for turning control over to the Board of Governors of the respondent were in the making. The Board rejected the respondent's argument.

5. The take-over of Earl Memorial Hospital has now been completed, effective April 1, 1982, and the respondent has renewed its argument with respect to the present application. There are twelve part-time employees at Bruce Peninsula & District Memorial Hospital, and six at Earl R. Harris Memorial Hospital. The evidence is that one of the part-time employees is already being scheduled at both Hospitals, at the employee's request, and the respondent would like to create a "float team" of one or two additional part-time employees who would be willing to be scheduled in the same way. The respondent relies upon this "interchange" of employees, together with the common administration, to support its argument for a bargaining unit encompassing both Hospitals.

6. As the parties are aware, the Board's normal practice is to look at an appropriate unit in terms of the municipal boundaries within which a facility is located. In this case that would mean the Town of Wiarton, and that is the basis on which the applicant has organized, both in the full-time unit (for which it was recently certified) and now in the part-time unit. This fairly rigid policy of the Board meets two concerns of the labour relations community: it provides an element of balance between the viability or rationality of bargaining units and the right to self-organize, and it provides a measure of predictability, along the lines of which parties can conduct themselves at the organizational stages of a certification campaign. Like every policy of the Board, of course, it is not without its exceptions. In *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491, for example, the Board noted its concern over the fact that the bargaining unit sought by the applicant transcended a number of municipal boundaries, and adverted to its normal policy in that regard. The Board then went on to state at page 492:

"This does not mean, however, that a regional bargaining unit will never be appropriate. Rather, it simply means that such a unit must be consistent with two basic considerations — 1) the right of self-organization; 2) the requirement that collective bargaining relationships be viable."

and then noted at page 493:

"In this case, the applicant has organized all but one of the stores falling within its proposed bargaining unit description, virtually eliminating any interference with the right of self-organization. This means that in this case considerations of viability assume greater importance."

7. In the instant case, by contrast, there has been no expression of interest in collective bargaining by the employees at the Lion's Head Centre, and the Board would need very compelling reasons to alter its normal practice in municipality-wide bargaining units in such a way as would either result in employees at Lion's Head being "swept in" to the bargaining unit essentially on the wishes of employees at Wiarton, or in the wishes of employees at Wiarton for self-organization being frustrated by the disinclination of employees at Lion's Head. This is a concern which the Board has to weigh even *within* the boundaries of a single municipality, where the tests laid down in *Usarco*, [1967] OLRB Rep. Sept. 525, normally are applied. For example, in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board noted:

“Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern of organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation.”

8. In the present case, the potential disruption to the respondent is not such as to cause the Board to grant the wider bargaining unit which the respondent seeks. The application is for part-time employees only, and the intended “float” pool appears to be a limited one. The one employee now accepting assignments at both institutions did so before the merging of control as well, apparently without difficulty. The respondent continues to keep separate books for accounting purposes, and the local supervision at each facility has been retained. There is, in addition, already in place a bargaining relationship for full-time employees which is confined to the staff employed at Wiarton.

9. The Board finds that all employees of the respondent at Wiarton, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 24, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

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**0281-82-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. Charterways Transportation Limited, Respondent**

**Bargaining unit – Parties agreeing to two “all employee” units – Separate units for mechanics and school bus drivers – Board expressing concerns about fragmentation – Requesting for submissions on appropriateness after conduct of pre-hearing vote**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**DECISION OF THE BOARD; May 25, 1982**

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. At the pre-hearing vote meeting convened by a Labour Relations Officer, the parties agreed to the following voting constituency and bargaining unit descriptions:

“Unit #1 - all employees of the respondent at or out of Mississauga, Ontario, save and except mechanics, dispatcher, and persons above the rank of dispatcher, and office staff.

Unit #2 - all employees of the respondent at or out of Mississauga, Ontario, save and except school bus drivers, dispatcher, and persons above the rank of dispatcher and office staff.”

Quite apart from the obvious difficulties that could be created by the existence of two “all employee” bargaining units in the event that a new classification was created by the respondent, the Board has some concern that acceptance of the bargaining unit descriptions to which the parties have agreed may result in undue fragmentation of the respondent’s work force. In particular, we are concerned about the attempt to create separate bargaining units for mechanics and school bus drivers. In view of our concern in this regard, we will adopt Unit #1 as a voting constituency but will permit mechanics to cast segregated ballots in the pre-hearing representation vote. After the vote has been conducted, a hearing will be held for the purpose of receiving and considering the representations of the parties concerning the appropriate bargaining unit(s) and any other outstanding issues, including the respondent’s contention (set forth in its Reply) that the Board should exercise its discretion under section 103(2)(i) of the Act to bar this application.

4. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
5. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent at or out of Mississauga, Ontario, save and except mechanics, dispatcher, persons above the rank of dispatcher, and office staff.

6. All employees of the respondent in the voting constituency on the 17th day of May, 1982, who have not voluntarily terminated their employment or who have not been discharged for cause between the 17th day of May, 1982, and the date the vote is taken will be eligible to vote.
7. The Board directs that Peter Brown, William Hyde, Robert Law, Allan O'Neill, Ellwood Tait, and all other employees classified by the respondent as mechanics be permitted to cast a ballot in the pre-hearing representation vote and that their ballots be segregated.
8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
9. The Registrar is directed to list this matter for hearing following the taking of the vote for the purpose of hearing the submissions of the parties with respect to the appropriate bargaining unit(s) and all other matters arising out of and incidental to this application.
10. The matter is referred to the Registrar.

**0053-82-R** International Brotherhood of Electrical Workers Local Union 1687, Applicant, v. Crowle Electrical Limited c.o.b. as **Crown Electric**, Respondent, v. Christian Labour Association of Canada, Intervener, v. Group of Employees, Objectors

**Bargaining Unit – Certification – Construction Industry – Displacement application seeking to represent employees in ICI sector – In view of requirements of section 144(1) Board not applying longstanding policy that displacing union must take incumbent's unit**

**BEFORE:** N.B. Satterfield, Vice-Chairman and Board Members J.D. Bell and H. Kobryn.

**APPEARANCES:** *Jeffrey Egner and Lou Popovich for the applicant; Richard Crowle for the respondent; John Adema for the intervener; no one appearing for the objectors.*

**DECISION OF THE BOARD;** May 17, 1982

1. The application was listed for hearing for the purpose of hearing the evidence and the representations of the parties with respect to all matters arising out of and incidental to the application including:
  - (a) the description of the bargaining unit, having particular regard to section 144(1) of the Act; and

- (b) the issue of who would be entitled to vote if a representation vote were to be directed and the form of the ballot.

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3. The Board finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and that the application is timely pursuant to section 5 of the Act.

4. The Board further finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

5. The applicant is seeking to represent the employees of the respondent in a bargaining unit described in the following terms:

“all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians’ apprentices in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.”

The respondent and the intervener are parties to a collective agreement which expired April 30th, 1982. The parties are agreed that the bargaining unit described in the collective agreement is for all electricians and electricians’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude save and except non-working foremen and persons above the rank of non-working foreman. The intervener and the respondent contend that the unit described in the collective agreement is the unit which is appropriate for collective bargaining and therefore should be the voting constituency for a representation vote were the Board to direct that one be held. They were relying on the Board’s long-standing policy that, where an applicant seeks to displace an incumbent bargaining agent and where a collective agreement is in force, the appropriate bargaining unit is the unit described in the collective agreement between the employer and the incumbent. The applicant contends that it is applying for certification pursuant to section 144 of the Act and that this section is a complete code for all applications for certification in the construction industry. Therefore, since the application is seeking to represent employees in the industrial, commercial and institutional sector of a construction industry, it must seek a unit which meets the requirements of section 144(1).

6. Section 144(1) provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

- (a) an employee bargaining agency; or



- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

7. The applicant and the intervener cited a variety of authorities to support their respective positions. Those cited by the applicant dealt with applications for certification which had been made since what is now section 144 of the Act first came into force on May 1, 1980. Those cited by the respondent dealt with applications made prior to the coming into force of section 144.

8. Having heard the submissions of the parties on the bargaining unit issue, the Board ascertained that, whether the unit was described as set out in the collective agreement between the intervener and the respondent or as sought by the applicant, the same employees, as of the application date April 5th, 1982, would be affected. Therefore the Board advised the parties that it would reserve its decision on the bargaining unit and would deal with the count and the membership support for the applicant to determine whether it was entitled to a representation vote. If it was, the Board would stand the matter down while the parties met with a Board Officer to make the voting arrangements and, if the Board could in the meantime determine the bargaining unit issue, it would bring the parties back before it and make its ruling orally.

9. The lists of employees duly filed by the respondent indicate that there were 21 employees at work in the bargaining unit on the date of the application, whether the unit is described as sought by the applicant or as contended by the respondent and intervener. Fourteen of the membership cards and separate receipts filed by the applicant in support of its application coincide with the names of the employees on the respondent's lists. Therefore, the Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 20, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under Section 7(1) of the said Act.

10. The Board gave its decision on the bargaining unit issue orally at the hearing and it confirms herein that decision:

Having considered the submissions of the parties with respect to the Board's policy under the *Labour Relations Act* when determining the voting constituency where the applicant is seeking to displace an existing bargaining agent and the effect thereon of section 144 of the Act, the Board rules as follows:

1). The Board's decision in *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, at paragraph 7, recognizes the principle that an applicant

which is an affiliated bargaining agent or any of the eligible applicants under section 144 of the Act determines whether an application made under that section relates to subsection 1 or subsection 3.

2). Having regard for that principle and for the principles set out in the Board's decision in *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, at paragraphs 6 and 7 with respect to the operation of section 144, the Board finds that the voting constituency in this application must be described in terms compatible with section 144(1) of the Act.

3). Therefore, the Board directs that a representation vote be taken of the employees of the respondent in a voting constituency as follows:

"all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman".

11. All employees of the respondent in the voting constituency on the 14th day of May, 1982, who have not voluntarily terminated their employment or who have not been discharged for cause between the 14th day of May, 1982, and the date the vote is taken will be eligible to vote.

12. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

13. The matter is referred to the Registrar.

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**2077-81-R** International Ladies' Garment Workers' Union, Applicant,  
v. Josh Industries Incorporated and **L. Davis Textiles Co. Limited**,  
Respondent

Sale of a Business – Company in business of manufacturing children's sleepwear taking assignment of lease from shut down clothing manufacturer – Purchasing and using small portion of equipment used by it – Number of employees laid-off due to shut down employed by purchaser – Not sale of business within meaning of Act.

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *S. B. D. Wahl and W. Villano for the applicant; L. Bertuzzi and M. Davis for the respondent.*

**DECISION OF THE BOARD;** May 26, 1982

1. This is an application under section 63 of the *Labour Relations Act*. The applicant requests a declaration that the respondent L. Davis Textiles Co. Limited (hereinafter "Davis Textiles") has purchased a business previously run by Josh Industries Incorporated. The applicant also alleges that the respondent Josh Industries Incorporated has violated section 15 of the *Labour Relations Act* and seeks a remedial order against Davis Textiles, the imputed purchaser of the business. It is common ground that any liability which Davis Textiles might have under section 89 of the Act could flow only from a finding by the Board that the sale of a business has taken place. The threshold issue therefore, is whether Davis Textiles has purchased the business of Josh Industries Incorporated within the meaning of section 63 of the *Labour Relations Act*.

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3. At the time of the hearing Josh Industries Incorporated was in receivership. The receiver attended the hearing and volunteered certain facts which were accepted as established on the agreement of the parties. The evidence of Davis Textiles was given by its President, Michael William Davis. There is little, if any, dispute as to the facts.

4. Davis Textiles manufactures diapers, infant's and children's sleepwear and infant's and children's bedding. Until December 31, 1981, it carried on business exclusively at 187 Geary Avenue in Toronto, employing some 325 employees, 250 of whom are in a unionized bargaining unit. It also has two warehouses in Toronto which employ two persons.

5. Eighty-five percent of the garment production of Davis Textiles is baby sleepers produced under the trade name of "Snugabye", up to size 6X. The balance of its garment production involves sleepwear manufactured for three large retailing chains under their private labels and for a separate private label, "Sleeptight", belonging to Davis Textiles. Some of the Snugabye sleepwear is produced under license: the three principle licenses are held for the national Hockey League, MacDonalds Restaurants Limited and for a popular childrens figure known as "Strawberry Shortcake".

6. In 1981 Davis Textiles' volume of sales began to outstrip its production capacity. It



faced the choice of either contracting its production to other manufacturers or expanding its own facilities. Because its goods are produced to a high standard by a unique automated method of production it did not wish to jeopardize its product quality by contracting out. It considered the possibility of expanding its Geary Street plant to an adjacent lot and decided that that alternative would be too slow to meet its production commitments. It therefore decided to open a new plant.

7. The company required a sufficient labour pool in whatever locality would be chosen for its new plant. It therefore placed tentative advertisements in a Mississauga newspaper for experienced sewing machine operators. The company was aware that Josh Industries had closed its plant in Mississauga and one of its advertisements was directly aimed at former employees of Josh Industries. When the advertisements attracted some 32 phone calls the company decided to pursue a Mississauga location and, in particular, to negotiate for the takeover of the plant previously occupied by Josh Industries. Before placing the advertisements the company had viewed the premises vacated by Josh Industries, including some of the machinery in the plant which was then in the hands of a receiver.

8. Davis Textiles decided to contact the receiver for Josh Industries with a view to purchasing the equipment, including ninety-nine sewing machines, in the Josh facility and taking an assignment of Josh's lease on the premises. On December 18, 1981, Davis Textiles tendered to the receiver a written offer to purchase the equipment on the premises and to assume the lease. The offer was accepted and the transaction closed on December 31, 1981.

9. Josh Industries went into receivership on November 16, 1981 and it appears that its last payroll was November 4, 1981. Davis Textiles therefore assumed possession of premises which had been vacant and idle for over a month. In the Mississauga plant Josh had produced casual tops, blouses and sweaters for women as well as children and men's sweatshirts. As noted above, the product lines of Davis Textiles were comprised chiefly of infant's sleepwear. The method of production differed between Josh and Davis, the latter being committed to a highly automated and computerized production system using Scandanavian technology and the former being based on the more traditional "bundle" system of textile production.

10. While considerable evidence and argument was directed to the differences in products and production methods between the two companies we do not find those to be determinative in this case. In our view this case can be disposed of without determining whether there has been a change in the nature of the business, a proposition which we would in any event be inclined to doubt.

11. The evidence establishes that the respondent Davis Textiles assumed the lease on a vacant plant in Mississauga. While it purchased the textile production machinery and equipment in that plant, that equipment was of limited use to it. Of some ninety-nine sewing machines on the premises approximately thirty-nine were kept for use in the transition period prior to the automation of the plant. The balance of the sewing machines were of little or no use to Davis Textiles, and a large portion of that capital equipment was sold.

12. Davis Textiles did not purchase any of the raw materials, finished goods or work in progress belonging to Josh Industries. Nor did it purchase or seek to acquire any of the trade marks or licenses previously owned by Josh. The evidence establishes that these were assigned to another manufacturer in the textiles industry. The finished goods on the premises were sold

by the receiver to some eleven separate purchasers, none of which was Davis Textiles. Similarly, Davis had no interest in the raw materials which were sold to some five other purchasers.

13. The staffing of the Mississauga plant by Davis Textiles does not support the conclusion that there has been the sale of a business. It is not disputed that Josh Industries at one time had a work force in excess of fifty employees, and that for a substantial period of time its compliment of personnel remained fairly constant, declining to the level of ten production employees immediately prior to the receivership. None of the supervisory staff of Josh Industries was recruited by Davis Textiles. While sixteen of the twenty-one employees at the Mississauga plant at the time of the hearing had previously been employed by Josh the evidence does not establish a taking over of the work force of Josh as such. The former Josh employees who became employed by Davis Textiles were among other applicants who applied, were interviewed and were hired on the basis of their skills. It is not disputed that a number of former Josh employees who did apply for work with Davis Textiles were not hired. The fact that laid off employees of Josh Industries formed part of the labour pool in Mississauga and found employment with Davis Textiles is not of itself enough to bring the facts of this case within section 63 of the Act.

14. Counsel for the union argued that in effect Davis Textiles had taken over the capacity to produce previously in the hands of Josh Industries. In this regard he stressed the Board's analysis and conclusions in *Bermay Corporation Limited*, [1979] OLRB Rep. July 608. The facts in *Bermay* differ from the instant case in a number of significant respects. In that case *Bermay* purchased a furniture manufacturing facility from *Goldcrest Furniture Limited*. In what was described as a "friendly deal" *Bermay* purchased virtually all of the capital assets, equipment, tools and raw materials of *Goldcrest*. As part of the transaction it undertook to fulfill a number of contracts outstanding with *Goldcrest*, using the vendor's raw materials for that purpose. Several members of *Goldcrest's* personnel were loaned to *Bermay* to train its staff in the production of *Goldcrest* products which, for a six week period, constituted approximately one-third of *Bermay's* production. The evidence also established that both supervisors and employees of *Goldcrest* remained in the employment of *Bermay*, having been recruited virtually off the floor of *Goldcrest* while it was still in operation. There was a smooth transition from one employer to the other with little hiatus in production.

15. As the Board noted in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 at 697 there can be no rigid formula for determining which factors or mix of factors will determine the sale of a business within the meaning of section 63 of the Act;

... No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of that most importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aides the Board in deciding whether the nature of the business after the transfer is the same it was before, i.e. whether there has been a continuation of the business.

16. Each application under section 63 of the Act must be assessed on its own merits. On the whole of the evidence before us we are satisfied that Davis Textiles Limited cannot be said

to have acquired the business of Josh Industries. The fact that it has rented premises previously occupied by Josh, that it uses a small portion of equipment once used by that company and has employed persons previously laid off by Josh falls short of establishing that there has been a sale of a business. For the foregoing reasons the application must be dismissed.

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**0593-81-JD** United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, Local 527, and United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, complainants, v. **Dominion Bridge Company Ltd.** and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Respondents, v. Electrical Power Systems Construction Association, Intervener

**Jurisdictional Dispute – Practice and Procedure – Collective agreement requiring referral of jurisdictional disputes to I.D.J.B. – Whether inaction on part of I.D.J.B. frustrating requirement – Board finding it has no jurisdiction**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *Alex J. Ahee and Jack Porter for the complainants; S. C. Bernardo and Ron Speight for Dominion Bridge Company Ltd.; Harold F. Caley and Frank Yong for International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128; no one appearing for the intervener.*

**DECISION OF THE BOARD;** May 31, 1982

1. The style of cause of this complaint is hereby amended to add United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada as a complainant, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers as a respondent.

2. This is a complaint under what is now section 91 of the *Labour Relations Act* in which it is requested that the Board issue a direction with respect to the assignment of certain work. The relevant collective agreements binding on the parties require that the work assignment dispute be referred to the Impartial Jurisdictional Disputes Board for the Construction Industry (“the IJDB”). The issue has accordingly arisen as to whether, because of the provisions of section 91(14) of the Act, the Board has jurisdiction to entertain the complaint.

3. At the initial hearing into this matter, counsel for the complainants contended that



the Board should not require that the work assignment dispute be submitted to the IJDB in that it was his understanding that the IJDB had ceased to operate, although he conceded that he had no concrete evidence to support this assertion. In a decision dated September 22, 1981, the Board ruled that since there was no evidence before it to indicate that the IJDB had ceased to operate, the parties were at least required to try to have the dispute dealt with by that body.

4. Subsequent to the Board's decision of September 22, 1981, Local 527 of the United Association requested that the matter be re-listed for hearing on the basis of its claim that the IJDB was "unable or unwilling" to hear the complaint. At the hearing, however, it was established that although Local 527 had requested of Mr. E. Moore, the jurisdictional representative of the United Association, that the matter be referred to the IJDB, Mr. Moore had declined to do so. Accordingly, prior to the hearing the United Association never actually referred the matter to the IJDB, a point which was reaffirmed in a telegram from Mr. Dale Witcraft, the Chairman of the IJDB, to counsel for Dominion Bridge Company Ltd.

5. Subsequent to the hearing, counsel for the complainants sent a telegram to Mr. Witcraft asking if the IJDB would adjudicate this work assignment dispute. On April 26, 1982, Mr. Ward, the President of the United Association, forwarded the following telegram to complainants' counsel:

The following telegram has been received in this office from Dale R. Witcraft, Chairman of the Impartial Jurisdictional Disputes Board. A copy of the original is being sent through the mail also.

Quote:

Re File Can 4-14-82, regarding jurisdictional dispute between Boilermakers and United Association over single-purpose flare stack work, Ontario Hydro Bruce Heavy Water Plant A project, Ontario, Canada, Dominion Bridge Co. Ltd.

Joint Administrative Committee of plan for settling jurisdictional disputes imposed moratorium on job decisions effective June 1, 1981. However plan for settlement of jurisdictional disputes and procedural rules of Board are still in full force and effect in all other aspects. For instance, disputing International unions must either adjust jurisdictional disputes directly or allow work to proceed as assigned by responsible contractor. See particularly Article VII, Sec. 5, and Article VIII, Sec. 2, which require that jurisdictional disputes be handled in accordance with procedures of plan.

Unquote:

Martin J. Ward, General President, UA.

6. Section 91(14) of the Act stipulates that the Board shall not inquire into a complaint where the parties in their collective agreement have a provision "requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them". Here the parties have agreed to refer work assignment disputes to the IJDB. If it had been established that this requirement had been "frustrated" because it was impossible or clearly futile to refer the dispute to the IJDB, then presumably this Board would have jurisdiction to entertain the complaint. The clearest example of such a situation would be if the IJDB had gone out of existence. On the limited evidence before us, however, we are unable to conclude that the IJDB has gone out of existence or that the relevant provisions of the

collective agreement have been frustrated to such an extent as to relieve the complainants of the requirement that they refer this matter to the IJDB.

7. Before leaving this matter, we would note that the collective agreement binding on Dominion Bridge and the United Association provides that if the IJDB fails to render a decision within sixty days of a disputed assignment, the union and the Electrical Power Systems Construction Association shall have recourse to this Board. As already noted, at the time of the hearing this work assignment dispute had not even been put before the IJDB. Accordingly, the parties have not had an opportunity to address themselves to the issue of whether Mr. Witcraft's telegram to Mr. Ward quoted above, or any similarly worded direction which Mr. Witcraft might issue in the future, amounts to "a decision" of the IJDB as that term is used in the collective agreement. We trust that if the parties do intend to raise this issue, sufficient evidence relating to the structure and operation of the IJDB, as well as the authority of its President to make decisions on its behalf, will be put before the Board so as to allow for a full and proper consideration of the matter.

8. Having regard to the above, we are satisfied that the complainants are required to refer this work assignment dispute to the IJDB, and that at least at the time of the second hearing they had not done so. Accordingly, pursuant to section 91(14), at the time of the hearing the Board lacked jurisdiction to inquire into the complaint.

#### **DECISION OF BOARD MEMBERS H. J. F. ADE AND C. A. BALLENTINE;**

1. We have no choice but to agree with Vice-Chairman Ian Springate as the decision relates to the operation of section 91(14). However, our sympathies are with the applicant union as well as other unions and companies in the construction industry in Ontario, when they endeavour to obtain a just resolve to jurisdictional disputes through the procedure of the "Impartial Jurisdictional Disputes Board" (I.J.D.B.) in accordance with existing collective agreements, such as the case at hand.

2. We want to make it clear that we have no quarrel with the "Procedural Rules" of the "I.J.D.B.". Our concern is one that the "I.J.D.B." and its predecessor the "National Joint Board for the Settlement of Jurisdictional Disputes" has been in a state of flux and disarray for a decade or more.

3. This is not the first time a union has been before the Board with pleas of frustration over what it considers the non-function of the I.J.D.B. The Board dealt with a similar situation in 1979, in *Ontario Hydro*, [1979] OLRB Rep. Feb. 124. That case involved a local union of the same complainant International Union and a sister local of this complainant local union in the instant case, and it involved the same Electrical Power Systems Construction Association (EPSCA) collective agreement.

4. As the Board held in the *Ontario Hydro* case referred to above, where all the parties to the jurisdictional dispute proceeding before the Board are bound by a collective agreement containing an operative provision referred to in section 91(14) of the Act, the Board does not have the jurisdiction to entertain the complaint.

5. If employers and trade unions in the construction industry in this province choose to continue to maintain collective agreements which *require* that they refer jurisdictional

disputes to a tribunal which is not functioning in a satisfactory manner, that problem must be resolved by the parties, and not by the Board or the legislature. That is precisely what the majority of the Board told the parties in 1979 *Ontario Hydro* case when it stated:

“In our view, where the parties have mutually selected a tribunal as contemplated in section 81(14) [now 91(14)], they bear the responsibility for ensuring that they have entrusted their disputes to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties.”

6. The purpose of section 91(14) is, in our view, to permit the parties themselves to fashion a procedure for resolving their jurisdictional disputes internally, without government intervention. This purpose is reinforced by the Act, since it requires the parties to comply with any decision issued by the tribunal selected by the parties. This objective is a laudable one which is consistent with our belief that the parties themselves know what is best for them in developing and maintaining good labour relations.

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## 2154-81-R F. C. M. Construction Limited, Applicant, v. Labourers' International Union of North America, Local 183, Respondent

**Termination – Practice and Procedure – Union not pursuing bargaining rights in timely fashion – Application for termination filed after request for but before appointment of conciliation officer – Termination application not untimely – Union not curing delay nor having reasonable explanation**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *Mark Contini, Leslie Ivanyi and Joao Frias for the applicant; B. Fishbein, M. J. Reilly and T. Connolly for the respondent.*

**DECISION OF THE BOARD;** May 3, 1982

1. This is an application under section 59 of the *Labour Relations Act* for a declaration that the respondent no longer represents certain employees.

2. F. C. M. Construction Limited (“F.C.M.”) is a Mississauga-based sewer and watermain contractor. On November 15th, 1979, the Board certified the respondent trade union (“the union”) for a unit of construction labourers in the employ of F. C. M. in the Board’s geographic area #8. On November 21, 1979, Mr. Tom Connolly, the union’s assistant manager, sent a notice to bargain to the company. The company never replied to the notice. Mr. Connolly testified that his practice was generally to follow up a notice to bargain, but he acknowledged that he did not do so with respect to F.C.M.

3. Mr. Connolly testified that he may not have followed up the notice to bargain either



because a standard form sewer and watermain agreement was due to expire on April 30, 1980, or because he was waiting for the company to start a new job. We doubt that the fact that the standard form sewer and watermain agreement was due to expire some five months later was what led Mr. Connolly not to follow up the notice to bargain. We reach this conclusion largely on the basis of Mr. Connolly's own testimony wherein he stated that after sending out a notice to bargain he would generally either call or visit the company involved, and that during the ensuing discussion the parties would sometimes agree that instead of signing an agreement immediately, they would wait for a new standard form agreement to be concluded. Mr. Connolly, however, never did phone or visit F. C. M. and, accordingly, there could not have been any agreement to wait until a new standard form agreement had been concluded. With respect to Mr. Connolly's statement that perhaps he was waiting for the company to start a new job, we are satisfied that he never contacted the company or any of its employees to see if the company was doing any work. As it happens, at about the time the notice to bargain was sent, the only job F. C. M. was performing was in Campbellford, outside Board area #8. However, in December of 1979, the company started on two contracts in Board area #8, one for the Borough of Etobicoke and the other for the Regional Municipality of Peel. Both of these contracts ran until mid-February, 1980. The respondent's next job, a subdivision project in Mississauga for \$330,000, commenced in mid-April of 1980. Except for certain winter shutdown periods, the company has been almost continuously active in Board area #8 since that time doing both subdivision work and performing contracts for local municipalities. It is also of some interest to note that section 121 of the Act expressly provides that in the construction industry a valid collective agreement can be entered into even if there are no employees in the bargaining unit at the time. Given these considerations, we are led to conclude that it was likely due to oversight and for no other reason that Mr. Connolly did not follow up the notice to bargain.

4. The only contact the union had with the company after forwarding the notice to bargain on November 21, 1979 was in September of 1980 when Mr. Frank Palazzolo, a business representative of the union, had a chance encounter with Mr. L. Ivanyi, the company's general manager, in a parking lot. Mr. Palazzolo asked Mr. Ivanyi about signing a collective agreement, to which Mr. Ivanyi replied that he would sign as soon as he got a new job. Mr. Ivanyi's comment was clearly misleading, since F. C. M. was in fact working in Board area #8 at the time. The union did not take any steps to check out Mr. Ivanyi's implied assertion that the company was not currently working. The union also did not subsequently contact F. C. M. or take any other active steps to ascertain if the company had acquired any new work.

5. In April of 1981, Mr. R. Reilly became the union's business manager and secretary-treasurer. Early in January of 1982, Mr. Reilly became aware, through the Southam Building Reports, that F. C. M. had obtained a contract from the Town of Oakville worth \$136,134. This prompted Mr. Reilly to inquire into the status of F. C. M. It appears that it was during this inquiry that Mr. Reilly first became aware of the union's outstanding certificate relating to the firm. It is not disputed that it was at this time that Mr. Reilly first learned of Mr. Palazzolo's conversation with Mr. Ivanyi in September of 1980.

6. On January 7, 1982, Mr. Reilly, on behalf of the union, requested that the Minister of Labour appoint a conciliation officer to confer with the parties in an endeavour to effect a collective agreement. In support of this request, Mr. Reilly relied on the notice to bargain served on the company on November 21, 1979. As required by the Minister, the union

forwarded a copy of the application to F. C. M. Upon receipt of its copy of the application, F. C. M. both objected to the appointment of a conciliation officer and also made the instant application to the Board. Notwithstanding the objections of the company, the Minister appointed a conciliation officer. The appointment was made on February 4, 1982, subsequent to the filing of the instant application on January 14, 1982.

7. Section 59(2) of the Act provides as follows:

When a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representative vote, declare that the trade union no longer represents the employees in the bargaining unit.

8. It is the contention of the union that this application should be regarded as untimely in that it was made after the union had requested the appointment of a conciliation officer. The timeliness requirements of section 59(2) can arguably be interpreted in a number of different ways. However, the very best interpretation from the point of view of the union is that this application became untimely once the Minister "had appointed a conciliation officer or mediator". Albeit that when this application was filed a request had been made to have a conciliation officer appointed, the fact remains that no such appointment had as yet been made. This being the case, the application is, in our view, clearly timely. We would further note that given the lack of activity on the part of the union, we are unable to agree with union counsel that somehow the company acted improperly in filing this application immediately after being advised of the request for the appointment of a conciliation officer. Until it received a copy of the request, the company appears to have assumed, with some justification, that the union had simply forgotten about it.

9. This application was filed on January 14, 1982, at a time when there were no employees in the bargaining unit. The company did employ some bargaining unit employees in February, but they had been laid off by the time this matter came on for hearing on March 15, 1982. At the hearing, we were advised that the company planned on commencing work and employing people within the bargaining unit in two weeks' time. If this projection was correct, then it is most likely that there are currently a number of employees working in the bargaining unit. At the hearing, counsel for the union contended that on the basis of a Board practice of refusing to terminate the bargaining rights of a union where there are no employees in the bargaining unit, the instant application should be dismissed. There are in fact a number of cases where, after a company had ceased operations and there were no longer any employees in the relevant bargaining unit, the Board declined to terminate the union's bargaining rights due to a failure to bargain. See, for example, *BLH Bertram Limited*, [1979] OLRB Rep. Jan. 1032. In such cases, it would have made little sense for the union to engage in bargaining unless and until the discontinued operations were reopened. That, however, is not the situation in the instant case. Here, except for certain winter shutdown periods, the company has been almost continually active and has employed bargaining unit employees. In these circumstances, we

decline to dismiss the application simply because it was filed at a time when there were temporarily no employees in the bargaining unit.

10. The purpose of what is now section 59 of the Act has been summarized as follows in *Medi-Park Lodges Inc.* [1979] OLRB Rep. Oct. 1007:

5. Certification gives a union an effective monopoly in the representation of a group of employees. Section 51 of the Act is therefore intended to insure that the rights of representation extended through a Board certificate are actively advanced by the union charged with that responsibility. While nothing in the Act can insure that the granting of bargaining rights will result in the consummation of a collective agreement, section 51 acts as a spur to require immediate and continuous efforts in bargaining on behalf of the employees concerned. A union that does not meet the minimum requirements of the section is liable, upon a successful application, to have its bargaining rights reviewed through the test of a representation vote, or to have them directly terminated.

11. In instances where a union has not met the time requirements set out in section 59, but has either subsequently sought to bargain within some relatively short time period, or has advanced some reasonable explanation for its delay, the Board has declined to terminate its bargaining rights. See: *Walmer Transport Co. Ltd.*, 53 CLLC ¶17,062. The Board has also refused to terminate a union's bargaining rights in situations where, although a few months have passed without any bargaining, the union has, prior to the filing of the termination application, demonstrated a renewed interest in bargaining. See: *Mohawk Construction Limited* [1981] OLRB Rep. Aug. 1156. In the instant case, however, the union's delay involved more than just a few months, and the union has not advanced any justifiable reason for not seeking to engage in collective bargaining. Further, there is nothing in the evidence to indicate that subsequent to November of 1979, the union has had any contact with employees in the bargaining unit. Given these circumstances, we are of the view that the employees should be given an opportunity to indicate whether or not they still desire to be represented by the union.

12. We would note that as part of its case, F. C. M. contended that the Board should declare that the union had abandoned its bargaining rights. For the Board to conclude that a union has abandoned its bargaining rights, it must be satisfied that the union has voluntarily given up or "walked away" from those rights. Although the facts involved bring this case very close to the line, we are not satisfied, especially due to Mr. Palazzlo's discussion with Mr. Ivanyi in September of 1980, that there was in fact an actual abandonment of its bargaining rights on the part of the union.

13. The Board directs that a representation vote be taken among the employees of F. C. M. Construction Limited. Those eligible to vote are all construction labourers employed by F. C. M. Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.



14. Voters will be asked to indicate whether or not they wish to be represented by Labourers' International Union of North America, Local 183 in their employment relations with F. C. M. Construction Limited.
  15. The matter is referred to the Registrar.
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**2551-81-R The Professional Staff Association of the Children's Aid Society of Hamilton-Wentworth, Applicant, v. The Children's Aid Society of Hamilton-Wentworth, Respondent**

**Bargaining Unit – Whether professional staff of Children's Aid Society appropriate unit – Whether Board using term "professional" in unit description – Appropriate units in child welfare field**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

*APPEARANCES:* Stanley Simpson and David Lane for the applicant; David E. Howlett, Sylvio Mainville and Donald Trebilcock for the respondent.

**DECISION OF THE BOARD; May 3, 1982**

1. This is an application for certification.
2. The applicant has not previously been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Accordingly, the applicant was afforded an opportunity to present evidence and argument on the threshold question of whether the applicant is a trade union within the meaning of the Act. Having regard to all the evidence before it, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.
3. The parties have reached partial agreement with respect to the description of the bargaining unit. The language upon which they have agreed is:

"All Child Care and Social Work staff employed by the respondent in the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for not more than twenty-four hours per week and persons represented by the Office and Professional Employees International Union, under a certificate dated March 15, 1982.

For purposes of clarity, it is understood and agreed that "supervisors" and "persons above the rank of supervisor" include team leaders, Public Relations Co-ordinator, Volunteer Co-ordinator, Special Projects Co-ordinator, Family Life Education Co-ordinator and Property Manager."

However, the applicant seeks to add the word “professional” after “Child Care and Social Work” so that the description (with the necessary grammatical changes) would read: “all Child Care, Social Work and professional staff of the respondent . . .” In support of the proposed addition, counsel for the applicant noted that the respondent presently employs a psychometrist who administers psychological tests but also exercises managerial functions. It was common ground between the parties that, at present, the psychometrist is properly excluded from the bargaining unit because of his managerial responsibilities. However, counsel suggested that in view of the backlog of psychological tests that need to be performed, it is quite possible that in the future the respondent might hire another psychometrist who would not exercise managerial functions but rather would devote all of his or her working hours to psychological testing. It was the applicant’s submission that such person, and any similar “professional”, should be included in the bargaining unit. It was also suggested that it is “possible that a whole range of professionals may become involved in the care and welfare of children under Children’s Aid.”

4. The respondent agreed that a psychometrist who did not have managerial responsibilities would properly be included in the applicant’s bargaining unit but contended that there was no need to add the word “professional” since such person would be included in the bargaining unit in any event since he or she would fall within the purview of the words “Child Care and Social Work staff”. That contention was disputed by counsel for the applicant who observed that the terms “Child Care” staff and “Social Work” staff are terms of art in the child care field, which have very specific meanings in that context. Thus, it was his submission that a “psychometrist” would generally be recognized as an occupational classification that was quite distinct from that of a “Child Care” worker or a “Social Worker”. Counsel for the respondent also contended that the inclusion of the word “professional” could give rise to a considerable amount of future litigation between the parties.

5. In a recent case (Board File 2434-81-R) involving the present respondent, another panel of the Board, in a decision dated March 15, 1982, (unreported) certified the Office and Professional Employees International Union as the bargaining agent for the following bargaining unit:

“all employees of the respondent employed in the regional municipality of Hamilton-Wentworth save and except senior accountant, membership secretary, secretary to the comptroller, secretary to the managing director, supervisors, persons above the rank of supervisor, professional staff, including Social and Child Care Workers and Public Relations Co-ordinator, Volunteer Co-ordinators, Special Projects Co-ordinator and Family Life Education Co-ordinator, Property Management and students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.”

In determining that bargaining unit to be appropriate, the Board wrote:

“3. The parties met with a Labour Relations Officer and resolved most of the outstanding issues in this application. Included in these discussions was an agreement as to the appropriate bargaining unit for this

application. That unit consists of all employees with certain exceptions of note, the professional staff including social and child care workers. Notwithstanding this agreement, as to the appropriate unit the respondent made certain representations to the Board concerning the appropriate unit. The thrust of the respondent's representations on the appropriate bargaining unit center around the last part of section 6(1) of the Act:

'Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.'

The respondent requests that in the circumstances of this case, the Board order a representation vote to determine the appropriateness of the bargaining unit. Counsel for the respondent pointed out that over the years most of the bargaining units involving Childrens' Aid Societies were agreed upon by the parties to such applications, and that no clear pattern emerged concerning office bargaining units as opposed to professional bargaining units. He pointed out that in the present case there was some concern by the employees as to the bargaining units and consequent bargaining structure in the respondent employers' operations. He thus suggested that since there are at least two possible appropriate bargaining units in the present case, it was open to the Board to find the wishes of the employees concerning the appropriateness of the bargaining unit.

4. The source of the respondent's concern in this regard is related to another application not before this panel of the Board, by another trade union for certain employees of the respondent. That application, having been made after the terminal date in this application, in accordance with section 103(3)(b) will not be considered by the Board until this application is disposed of. On the other hand it is clear that the employees affected by the present application have chosen the applicant as their bargaining agent by a substantial majority. In these circumstances, therefore, we are reluctant to apply our discretion in section 6(1) of the Act and conduct a vote since we are of the view that the employees have already made it clear that this unit is appropriate by their choice of bargaining agent.

5. Having regard to the agreement of the parties, the Board therefore finds that all employees of the respondent employed in the regional municipality of Hamilton-Wentworth save and except senior accountant, membership secretary, secretary to the comptroller, secretary to the managing director, supervisors, persons above the rank of supervisor, professional staff, including Social and Child Care



Workers and Public Relations Co-ordinator, Volunteer Co-ordinators, Special Projects Co-ordinator and Family Life Education Co-ordinator, Property Management and students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.”

As indicated in that passage, the Board’s jurisprudence in this area indicates that, depending upon various circumstances, including the size of the Children’s Aid society in question, separate “office” and “professional” bargaining units, or a comprehensive “all employee” bargaining unit, may be appropriate. For example, in the *Children’s Aid Society of the District of Nipissing* [1976] OLRB Rep. Dec. 861, the parties agreed that both “office and clerical workers” and “professional social workers” should be included in an “all employee” bargaining unit. In rejecting the employer’s contention that “group home parents” should be excluded from the unit, the Board stated:

“9. The group home parents are different from the office staff or social workers as well by dint of training and educational background. There is no evidence of any formal training or experience required for them. They differ as well in respect of skills and the place and conditions of employment. We are satisfied that they have a separate community of interest.

10. But the matter does not end there. In assessing the make-up of a viable collective bargaining unit, that is to say, a bargaining unit that will endure and promote sound labour relations, the Board must go further. It must consider whether the utility of smaller units based on a separate community of interest overrides the disutility that might result from the fragmentation of the respondent’s employees for collective bargaining purposes. In some circumstances the delineation of separate bargaining units may conduce to healthy labour relations. In other circumstances it may produce the balkanization described in *Ponderosa* [*Ponderosa Steak House* [1975] OLRB Rep. Jan. 7].

11. The Board must endeavour to define bargaining units that can, at the very least, be rationalized and understood as coherent units with a common and consistent base. That may be done by reference to community of interest or, where sound policy requires it, by some broader reference. And while it is true, as the Board noted in the *Ponderosa* case, that the Act creates no presumption in favour of the most comprehensive unit of employees, there may be circumstances where a comprehensive unit offers the alternative that will best serve the collective bargaining relationship of the parties.

12. As reflected in the *Eastern Ontario Health Unit* case, [1976] OLRB Rep. Nov. 687, one of the factors that the Board considers in rationalizing the appropriateness of the bargaining unit is the agreement of the parties on that portion of the unit that is not in dispute.

13. In the instant case the Board notes that the parties have agreed to include the clerk-typists and accountant in the same bargaining unit as the social workers. When the office and clerical staff are compared to the social workers in light of the criteria in the *Usarco* case, it is apparent that they, like the group home parents, have their own community of interest. (See the Board's finding respecting the separate community of interest between secretaries and social workers in the *Children's Aid Society of Huron County* [1971] OLRB Rep. Oct. 632). It appears that the most that can be said to describe common ties between the office staff and the social workers is that they sometimes work on the same premises and that they are employed and supervised by common supervisors. Nearly as much can be said of the group home parents. That being so, and bearing in mind the relatively small number of employees in the bargaining unit, we see no good reason why the group home parents should not be included in a single bargaining unit along with the office employees and social workers. Such a unit would, in our view, be a viable collective bargaining structure."

See also *Children's Aid Society of Metropolitan Toronto*, [1978] OLRB Rep. Jan. 98, in which the Board accepted the agreement of the parties to an "all employee" unit. Although the full range of classifications included in that bargaining unit is not specified in that decision, which deals only with the exclusion of "Social Work Supervisors", it is implicit in the express exclusions from that bargaining unit (namely, "Department Heads/Executive Director and persons above the rank of Department Head/Executive Director, Assistant Property Manager, Personnel Officers, Planning Analysts, Secretaries to the Executive Director, Secretary to the Executive Assistant, Secretary to the Assistant Executive Director, Secretary to the Director of Planning and Development, Secretaries to the Branch Director, Secretary to the Director of Personnel and Training, Secretaries — Personnel, and Secretary to the Labour Relations Manager, Social Work Supervisors, Child Care Supervisors, Office Supervisor in finance and administrative services, Volunteer Supervisor, Co-ordinator, Maintenance Superintendent, Training Officer, Health Service Co-ordinator Foster Parents Association, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week") that the unit included social workers, child care workers and office and clerical workers.

6. However, as indicated above, the Board has also found bargaining units that were, in effect, confined to "professional" staff to be appropriate in the child welfare field. For example, in the *Children's Aid Society of Huron County* [1971] OLRB Rep. Oct. 632, the Canadian Union of Public Employees sought to have all of the employees of the employer included in one bargaining unit. The employer, on the other hand, contended that there were two appropriate bargaining units, namely, a bargaining unit consisting of social workers, and a bargaining unit consisting of secretaries. In accepting the employer's position, the Board wrote:

"6. The evidence before the Board reveals that while the secretaries work closely with the social workers and the co-ordinators, their work is

essentially confined to routine matters. Their familiarity with the work of the respondent and their exercise of initiative is confined to areas closely controlled by the social workers and the co-ordinators, and, when their duties are viewed as a whole, it appears that the amount of initiative expected of and exercised by the secretaries is no more than would be required of secretaries who are interested in and informed about the work of their employer. It appears that the secretaries spend all of their time in the office, whereas the co-ordinators and social workers spend half of the time out of the office.

7. In addition, whereas the secretaries work regular working hours, the social workers and co-ordinators have flexible hours because their work is dependent on the exigences [sic] of the matters before them. Apparently, in recognition of the difference in the hours worked the social workers and co-ordinators receive one month's vacation each year, while the secretaries initially receive two weeks' vacation each year. There is a considerable difference in salary between the secretaries on the one hand and the social workers and co-ordinators on the other.

8. Moreover, it is quite clear that whereas the work of the secretaries is confined to essentially routine matters within the office, the co-ordinators and social workers exercise skills and personal judgment derived from their training and experience in the field of social work in dealing with the situations which beset persons who have dealings with the respondent. In our opinion, the secretaries on the one hand and the co-ordinators and social workers on the other hand do not share a community of interest and, in the circumstances of this application, the Board finds that the secretaries and the social workers ought properly be included in separate bargaining units."

After reviewing the duties and responsibilities of the "co-ordinators", and concluding that they did not exercise managerial functions, the Board found that all social workers and co-ordinators in the employ of the respondent, save and except the Director and persons above the rank of Director, constituted a unit of employees of the respondent appropriate for collective bargaining. Similarly, in the *Children's Aid Society of Sault Ste. Marie and District of Algoma*, [1973] OLRB Rep. March 161, the Board found a unit comprised of (part-time) social workers, social work assistants and case-aides to be appropriate for collective bargaining. (It is implicit in that decision that the Board had earlier found a similar full-time unit to be appropriate on the agreement of the parties.) In *Catholic Children's Aid Society of Metropolitan Toronto*, Board File No. 3642-73-R, decision dated January 30, 1974, (unreported), the Board found to be appropriate the following bargaining unit description to which the parties had agreed:

"all persons employed by Catholic Children's Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto including Social Workers, Child Care Workers, Psychologists, Psychometrists, Nurses, Court Workers and Putative Father Workers, save and except Supervisors, persons above the rank of Supervisor, persons employed for not more than 24 hours per week and students



employed during the school vacation period, *office and clerical staff, drivers, maintenance staff, housekeepers and homemakers.*"

(emphasis added)

Although that unit is framed as an "all employee" unit, it is clear from the express inclusions and exclusions that it is in fact confined to "professional" staff such as social workers, child care workers, psychologists, psychometrists, and nurses.

7. As noted above, the Board, in a very recent case involving the present respondent and another trade union, excluded "professional staff, including Social and Child Care Workers" from an "all employee" bargaining unit. It is implicit in the respondent's agreement to that language that the respondent has recognized that there are "professional staff" in the child welfare field who are not subsumed within the terms "Social and Child Care Workers". This is also apparent from the classifications specified in other Board certificates in this area, which classifications include psychologists, psychometrists and nurses.

8. In the health care field, the Board has declined to use the term "professional" in bargaining unit descriptions, due to the undue fragmentation of an employer's work force which could result from placing "professional" and "technical" employees in separate bargaining units, and due to the inherent difficulties in distinguishing between "professional" and "technical" employees. (See, for example, the Board's decision in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which contains a detailed explanation of the Board's approach. See also *Hôpital Montfort*, [1980] OLRB Rep. Nov. 1647, and *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672.) To avoid such difficulties, the Board has adopted the term "paramedical personnel" in its bargaining unit descriptions in the health care field. Should similar problems emerge in the child welfare field, it may become necessary for the Board, with the assistance of the trade unions and employers involved in that area, to develop analogous terminology in this context, such as "professional and para-professional staff". However, neither party addressed that matter in these proceedings and we are of the view that in the absence of such submissions, it would be undesirable for the Board to express a final view on that issue in the present case.

9. As stated above, it is implicit in the respondent's agreement to exclude "professional staff, including Social and Child Care Workers" from the "all employee" bargaining unit in File No. 2434-81-R, that such terminology is meaningful in the context of its operation. To avoid the possibility that any such "professional" employee excluded from the "all employee" bargaining unit, might also be excluded from the applicant's bargaining unit, thereby either effectively precluding him or her from obtaining union representation (in view of the section 6(1) requirement that a bargaining unit consist of more than one employee), or (if more than one such "profession" is hired) creating the possibility of further fragmentation of the respondent's work force, the applicant seeks a unit that will clearly cover the full ambit of that "professional" exclusion. In the circumstances of this case, and without suggesting that a similar description will be adopted by the Board in future cases involving other parties, the Board is disposed to grant the applicant's request.

10. For the foregoing reasons, the Board finds that all Child Care, Social Work and professional staff of the respondent employed in the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, students

employed during the school vacation period, persons, regularly employed for not more than twenty-four hours per week and persons represented by the Office and Professional Employees International Union, under a certificate dated March 15, 1982, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. For purposes of clarity, the Board notes the agreement of the parties that "supervisors" and "persons above the rank of supervisor" include team leaders, Public Relations Co-ordinator, Volunteer Co-ordinator, Special Projects Co-ordinator, Family Life Education Co-ordinator and Property Manager.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 20, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

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## **2319-81-OH Dennis Wawia, Complainant, v. Inco Metals Company, Respondent**

**Health and Safety – Practice and Procedure – Grievances filed but withdrawn prior to arbitration stage – Whether complainant bound by election – Election between arbitration and safety complaint – Not between grievance procedure and safety complaint – Delay not unreasonable so as not to entertain complaint**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

**APPEARANCES:** *K. Valentine, D. Sweezey, Dennis Wawia and Mike Perry for the complainant; D.K. Gray and R.E. Drewe for the respondent.*

### **DECISION OF THE BOARD; May 27, 1982**

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*, 1978, alleging that the complainant, Dennis Wawia, has been disciplined for acting in compliance with the Act.

2. Specifically, the complaint alleges that:

"On or about May 1981 the complainant was dealt with by Inco Metals Company, Bill Cranley of the respondent contrary to the provisions of section 24 of the Employee's Health and Safety Act in that he did on his

own behalf of the respondent: Send Mr. Wawia home and gave him a Step 2 for envoking Bill 70...”.

The respondent took the position that the complaint was not sufficiently particularized to permit it to prepare its case. The Board noted that only the date appeared to be insufficiently particularized in the complaint. The complainant explained that the incident occurred on the night shift, and he was unsure whether to indicate May 10th or 11th. The Board pointed out that either of those dates could have been used, with the words “on or about”, to provide as precise an identification of the event as possible. The respondent conceded that the complainant received only one Step 2 Notice in May of 1981, and the Board stipulated that its inquiry would be confined to the events giving rise to that Step 2 Notice.

3. The respondent also took the position that the Board ought to refuse to entertain the complaint on the ground of delay. The complainant filed two grievances under his collective agreement on May 15, 1981. The final company replies were issued on August 14, 1981, and on September 17, 1981, the grievances were posted by the Steelworkers (Mr. Wawia’s bargaining agent) to arbitration. The grievances were then withdrawn from arbitration by the bargaining agent on October 26, 1981, and dropped. The apparent reason for this was the sudden realization by the Bargaining Committee that the matter more properly belonged in front of the Ontario Labour Relations Board under the *Occupational Health and Safety Act*.

4. Just at this point in time, however, the person who occupied the position of Chairman of the Union’s Health and Safety Committee resigned rather abruptly to accept employment elsewhere, and was replaced by Donald Swezey. Mr. Swezey then had to read through all of his predecessor’s files in order to identify the status of the various matters outstanding for the members of this substantial Local. When the matter involving Mr. Wawia came to his attention, he discussed it on a couple or more occasions with officials of the company to see if it could be resolved short of going to the Labour Board. The present complaint was not actually filed with the Board until February 9, 1982.

5. Mr. Gray for the respondent points out that this is almost four months from the time the matter was withdrawn from arbitration, and nine months from the date of the incident itself, and argues that this is simply too long a delay to be countenanced.

6. Dealing with the last point first, the Board notes that a good part of the nine months was consumed by having the matter progress through the normal channels of the grievance procedure, and the Board left no doubt in *Reed Limited*, [1978] OLRB Rep. Jan. 1, of the importance of that taking place prior to filing a health and safety complaint with the Board. As to the delay from October 26th to the filing of this complaint, Mr. Valentine argues on behalf of the complainant that the complainant ought not to bear the loss for any fault on the part of the trade union that represented him. The Board has noted in the past, however, that a party must bear the responsibility for the acts of its authorized agents, (see *Gurnam Dhanota*, [1982] OLRB Rep. Jan. 113, and the cases cited therein). If the delay in this case were excessive, it would be no answer for the complainant to lay the blame on his agent. However, given the circumstances surrounding the change in leadership within the union, the efforts of Mr. Swezey to attempt to resolve the matter, and the length of the delay itself, the Board does not find the delay in this case to be sufficient ground for declining to hear the complaint.

7. The final preliminary ground argued by the respondent is that the complainant



made an election at the time that his grievance was posted to arbitration, and thereby forfeited any right he may have had to have the matter dealt with as a complaint before this Board. The respondent relies on the words of the Board in *Reed Limited, supra*, which discussed the inter-relationship of the alternate courses of proceeding offered to an aggrieved worker under section 24 of the *Occupational Health and Safety Act*. The employer in that case had argued that the filing of a grievance alone was sufficient to bar an employee from filing a complaint with the Board. The Board stated:

To adopt the approach argued by the respondent would force an employee to forego the grievance procedure entirely in order to preserve the right of recourse to the statutory procedure. Such a development, in our view, would not be desirable from an industrial relations perspective. If there exists a grievance procedure, employees should be encouraged to utilize that process before pursuing the statutory procedure. The Board, therefore, should not foreclose an employee from bringing a complaint before it simply because that employee has had his union take the matter through the grievance procedure. Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

In that case, however, the Board was dealing only with the effect of having a “live” grievance ongoing in the grievance procedure, and the Board said that the employee had to exhaust the grievance procedure before coming to the Labour Board. The Board did not have before it the situation where the trade union, for whatever reason, declines to pursue the employee’s matter all the way to arbitration.

8. The critical words of the legislation are:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection 1, the worker may either have the matter *dealt with by final and binding settlement by*

*arbitration* under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection 2, and section 89 of the *Labour Relations Act*, except subsection 5, applies with all necessary modifications, as if such section, except subsection 5, is enacted in and forms part of this Act.  
(emphasis added)

Mr. Gray argues that the Legislature, by the use in section 24(2) of the word “settlement”, must have had in mind the full range of possibilities included in the process of arbitration, including the possibility of settlement of the grievance at the discretion of the employee’s exclusive bargaining agent. Once the employee elects to place his complaint in the hands of his trade union for processing to arbitration, the normal rules of collective bargaining apply with respect to the trade union’s total and unfettered right as bargaining agent (subject only to the duty of fair representation) to dispose of the grievance as it considers appropriate.

9. The Board cannot agree. The *Occupational Health and Safety Act* appears to stand apart in the manner in which it recognizes the rights of an individual “worker”, as distinct from any other form of representative (cf., for example, section 23(4) of the Act). This point was emphasized by the Board as well in *Reed Limited*, beginning at paragraph 7, where it stated:

7. Our reading of the Act, and especially section [24], is that the statute contemplates that any complaint brought under it must be in essence an employee complaint. A trade union, as bargaining agent for employees, is not the beneficiary of the substantive protections provided by subsection (1) of section [24].

• • •

9. The union, although named as complainant, could only act as the agent of the named grievors, having no independent power to carry, or settle, the complaint. The complaint, therefore, would be in essence the complaint of the employee, and would be compatible with the scheme of the Act.

Mr. Gray sees the Legislature as having placed great emphasis on the word “settlement” in section 24(2). In the Board’s view, however, the emphasis of the Legislature was on the word “*arbitration*”, and the term “settlement” was simply used as another word for “determination”. The “settlement”, in other words, is an arbitrated one. The Board can find nothing in the statute to justify reading the reference to “arbitration” as contemplating anything other than “an *adjudicative* procedure”, once again as noted in *Reed Limited*, *supra*, at paragraph 11.

10. The Legislature has simply said, in other words, that an aggrieved “worker” under this Act is entitled to either third-party adjudication under his collective agreement, or the opportunity to file a complaint with the Ontario Labour Relations Board. As the Board went on to note in *Reed Limited*, however, the employee cannot ride two horses; and once he

authorizes the matter to be posted to arbitration, he cannot withdraw that authorization and insist that the matter be filed with the Board instead. Rather, the trade union at that point has the right to pursue the matter through to adjudication by arbitration if it chooses. If, as Mr. Gray argued, situations of abuse should occur as a result of this statement of the law, it is to be noted that the Legislature has not failed to provide the Board in section 24(3) with the same discretionary power to hear or not to hear a complaint as has been entrusted to the Board under section 89 of the *Labour Relations Act*.

11. In the present case, the trade union did not see fit to pursue the arbitration process through to an adjudication, and the preliminary objection is dismissed.

12. The matter is referred to the Registrar for continuation of hearing on the merits.

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## **2234-81-OH John Cesaroni, Complainant, v. T. W. Johnstone Co. Limited, Respondent**

**Health and Safety – Employee refusing to use tools not bearing CSA certification label – Calling in safety inspector – Whether dismissed for exercising rights under legislation**

**BEFORE:** R. D. Howe, Vice-Chairman and Board Members C. G. Bourne and D. B. Archer.

**APPEARANCES:** *C. J. Abbass, John Cesaroni and W. Weatherup for the applicant; R. R. Nicholson, W. Johnstone, Ron Dagg, Bill Hopper and Louis Eldridge for the respondent.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; May 10, 1982**

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* (the “Act”) in which the complainant alleges that he has been dealt with contrary to section 24(1)(a) of the Act. In particular, he alleges that foreman Bill Hopper threatened to dismiss him on June 18, 1981, and did in fact dismiss him on June 22, 1981, because he “acted in compliance with this Act in refusing to work with tools (electrical fusion tools) that did not bear the C.S.A. label” and because he “asked for an inspector to attend on the site resulting in an Order being made against the Respondent under the Act.”

2. Section 24 of the Act provides, in part, as follows:

“(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or



(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and froms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

5. On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upn the employer or the person acting on behalf of the employer."

3. The respondent, which operates out of London, Ontario, installs natural gas pipelines, primarily for Union Gas Limited. As a result of a successful bid, the respondent obtained a contract to install gas lines in a new subdivision in the Burlington area from April 1, 1981 to December 31st of that year. The contract called for the installation of both steel pipe and plastic pipe. Unlike sections of steel pipe, which are joined by welding, sections of plastic pipe are "fused" through a heat transfer process whereby an electric heating iron is attached to the plastic pipe for a number of seconds before removing it and allowing the fused pipe to cool.

4. William Weatherup is a pipeline business representative for Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 46"). The Territory for which he is responsible includes the Burlington area. On Friday June 5, 1981, Mr. Weatherup attended at the site and expressed concern to the respondent's general superintendent, Ron Dagg, that the respondent was not employing members of Local 46 on the job. The complainant, who was unemployed at that time, accompanied Mr. Weatherup as a "witness". (The evidence indicates that the complainant had previously accompanied Mr. Weatherup from time to time during periods of unemployment, while Mr. Weatherup was "policing" various jobs.) As a result of his conversation with Mr. Dagg, Mr. Weatherup sent the complainant and another member of Local 46 to the site the following week. The complainant is a 37 year old journeyman pipe fitter

who has been a member of Local 46 since 1961. The other worker sent to the site by Local 46 was classified as a welder but agreed to work as a welder's helper after his first three welds were rejected by Union Gas X-ray technicians.

5. The complainant commenced employment at the site on Tuesday June 9th, as a journeyman "spacer" and "stabber", guiding pieces of steel into clamps which hold them the appropriate distance apart in the trench for welding puposes. He was also appointed by Local 46 as the union steward on the site. During his first week of employment, the complainant performed to the satisfaction of management, although it appears that some conflict developed between the complainant and a crane operator concerning "who was going to do the setting in of the pipe".

6. On Thursday June 18th, the complainant commenced work at 7:30 a.m. and assisted the crew's welder (and fuser), Louis Eldridge, in making about a half dozen fusions, during the course of which the complainant remarked to Mr. Eldridge that he had never before seen such "good looking" irons, as they were shiny and new. However, when the complainant examined the irons more closely, he discovered that they did not have a C.S.A. (Canadian Standards Association) sticker on them. Accordingly, he advised Mr. Eldridge that they could not use them any more because they were not C.S.A. approved. Mr. Eldridge then examined the irons and confirmed that there was no C.S.A. sticker on them. Although Mr. Eldridge was not aware that the complainant was the "safety rep on the job", he nevertheless ceased to use the irons "because he (the complainant) was the steward." The complainant then told Mr. Eldridge that he was going to check with his union representative concerning the safety of the irons and that "while doing this [he] would also check on the fact that the labourers were installing what [he] believed to be [Local 46's] piping work." Since the foreman was not present at that time, the complainant asked Mr. Eldridge to tell him that he (the complainant) had left to go to the washroom.

7. The complainant then telephoned Mr. Weatherup and discussed the two matters that were causing him concern. Mr. Weatherup said that he would take care of the jurisdictional matter by calling the respondent, and instructed the complainant to "go back and inform the Company of the safety infraction." During the complainant's absence, Mr. Eldridge informed Mr. Hopper of what had occurred that morning. When the complainant returned to the site, Mr. Hopper was quite angry with the complainant and threatened to dismiss him as of the end of that work day. (Although Mr. Eldridge did not hear the precise words which Mr. Hopper spoke to the complainant, he agreed in cross-examination that Mr. Hopper and the complainant had a "heated" discussion and that Mr. Hopper was "riled up" because "a job shutdown costs money".) In the ensuing discussion, the complainant told Mr. Hopper that "the work would progress the way it was with the labourers" and that he wanted a safety representative from the Company or from "Construction Safety" to check the irons.

8. Approximately half an hour later, superintendent John Richmond came to the site, examined the irons and then sought out Mr. Hopper. A few minutes later, Messrs. Richmond and Hopper approached the grievor and asked him if he wanted to be a welder's helper since there was no more work for him as a spacer and stabber. The complainant stated that he was hired as a journeyman pipe fitter and that there was "fitter's" work to be done. Although Mr. Hopper denied that there was any discussion of the wage rate that would be paid to the complainant as a welder's helper, we accept the complainant's evidence that he asked what his rate of pay would be and was told, "if you work as a helper you will be paid as a helper." With

respect to our resolution of that conflict in the evidence, we note that Mr. Richmond, who was present during that important discussion, was not called by the respondent as a witness in these proceedings. Under the circumstances, it is reasonable to infer that Mr. Richmond's evidence would have been unfavourable to the respondent's case or at least would not have supported it (see *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645, and the authorities cited therein). Furthermore, even if the Board were to accept Mr. Hopper's evidence that there was no discussion concerning what the complainant's wage rate would be if he accepted a position as a welder's helper, this would not preclude a finding that the respondent was attempting to penalize the grievor by offering him what amounted to demotion from the position of journeyman to the position of "welder's helper" on a "take it or leave it" basis. Thus, under the circumstances, management's failure to assure the complainant that he would not suffer any wage reduction, as the respondent's president assured the Board would have been the case if the complainant had accepted the position, would itself permit the Board to infer that the discussion in question, which occurred shortly after the complainant had raised the safety issue, was intended to cause the complainant to believe that he was going to be penalized, and to lay the groundwork for the complainant's resignation or discharge from employment. The complainant's reaction to management's "offer" was what management must under the circumstances have anticipated that it would be; he stated that he was not willing to work as a welder's helper under those terms. Mr. Hopper then turned to Mr. Richmond and said, "I guess he's gone." Mr. Richmond concurred.

9. The complainant then telephoned Mr. Weatherup again and arranged for him to attend at the site. When Mr. Weatherup arrived, he asked Mr. Richmond if he could take the complainant off the site to discuss the matter with him. Mr. Richmond's response was that the complainant was still in the employ of the Company and that he could not leave because he was not "on his own time". Accordingly, the complainant and Mr. Weatherup decided to wait until lunch period to discuss the matter.

10. During the complainant's lunch break, the Construction Health and Safety Branch of the Ministry of Labour was contacted at its Hamilton office and a Construction Safety Officer was requested to attend at the site to examine the heating irons. The Construction Safety Officer (hereinafter referred to as the "Inspector") arrived at the site at approximately 1:30 p.m. After checking the irons and their cords, he advised Mr. Hopper that the complainant could not be discharged for seeking enforcement of the Act and Regulations, and ordered the respondent to comply with "Regulation 103(1) and (2)". Section 103 of Regulation 691 (R. R. O. 1980) under the Act provides:

"103(1) Subject to subsection (2), any cord-connected electrical equipment or tool shall have a casing which is effectively grounded.

(2) Subsection (1) does not apply to any cord-connected electrical equipment or tool that is effectively double-insulated and that does not show any evidence of cracks or defects in the insulated casing."

The inspector further ordered the respondent to "provide proof that these irons are approved in accordance with the Electrical Safety Code under the *Power Compensation Act*, R. S. O. 1970, c. 354, as amended, [through] Canadian Standards certification or Ontario Hydro Special Inspection". However, the inspector did not find that the respondent's contravention of the Regulations was a danger or hazard to the health or safety of a worker. Accordingly, he



authorized the respondent to continue using the irons while arrangements were made to comply with the order. In accordance with that order, the respondent arranged for a "Special Inspection" by Ontario Hydro on the following day and obtained the necessary approval for the equipment.

11. Although the respondent had used the heating irons of that type for "two or three years" without ever having any problems with them, it was readily conceded on behalf of the respondent that the complainant, who had never previously worked with that type of heating iron, was acting within his rights under the Act in questioning the absence of a C.S.A. sticker. Moreover, it was Mr. Weatherup's uncontradicted evidence that short circuits in fusing irons have been a serious problem in the pipe laying industry in Ontario.

12. Several of the management witnesses testified that the effect of the complainant's actions on the respondent's operations was minimal. Mr. Dagg testified that although the welder "may have lost an hour or two while the Inspector came out, the rest of the crew continued to dig trench and string out pipe." Thus, he told the Board that "the job disruption wasn't particularly significant". However, as noted above, Mr. Hopper was quite upset when he heard that the complainant had brought the pipe fusion work to a standstill by questioning the safety of the heating irons. As noted earlier in this decision, Mr. Eldridge, whom we found to be a very candid and credible witness, confirmed that the complainant and Mr. Hopper had a "heated" discussion and testified that Mr. Hopper's angry reaction resulted from the fact that the complainant had "shut the job down". Moreover, we are satisfied on the totality of the evidence before us that the respondent did not "lose merely an hour or two" of fusing, but rather lost most of that working day since fusing had ceased by 9:00 a.m. and did not recommence until after 3:00 p.m.

13. At the end of the work day, the complainant contacted Mr. Hopper and "asked about his standing as of that evening". Mr. Hopper told him to come in the next day since he was "still working there". The complainant then reminded him that he (the complainant) would be absent on the following day due to the OLRB hearing with respect to his discharge grievance against Cliffside Pipelayers Limited. When the complainant attended at the site on the following Monday, Mr. Hopper gave him his "dismissal papers", which included payment of five hours wages for that day.

14. The complainant subsequently grieved his dismissal but for reasons not disclosed by the evidence, Local 46 did not pursue his grievance to arbitration. It was contended on behalf of the respondent that Local 46's failure to proceed with that grievance demonstrated that the complainant's case lacked merit. However, we are not prepared to draw any such inference in the circumstances of this case. Under section 24(2) of the Act (as set forth above), the complainant was entitled to "either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board". It is apparent that in light of the failure by Local 46 to refer his grievance to arbitration, the complainant elected to file the instant complaint with the Board. Under section 24 of the Act, the validity of a complaint filed with the Board under that section is a matter to be determined by the Board, not by the complainant's bargaining agent.

15. It was Mr. Dagg's evidence that the complainant was dismissed because of the complaints about his work which Mr. Dagg received from the superintendent and the foreman during the second week of the complainant's employment, and because the grievor refused to

work as a welder's helper. It was Mr. Dagg's evidence that the complainant's actions caused morale to be "very bad in the crew", to the point that welder Louis Eldridge was so "frustrated" that he was on the verge of quitting. However, Mr. Eldridge's testimony did not indicate that the situation was that dramatic. Mr. Eldridge has over twenty years' experience as a gas line welder and is qualified to do both welding and fusion. He has been employed by the respondent for almost twelve years. One of the irritants in the relationship between Mr. Eldridge and the complainant was the latter's tendency to tell the former that he was not performing fusions in the manner which the complainant thought to be proper as a result of his prior experience. The evidence also indicates that when the crew began working with plastic pipe, the complainant took issue with the fact that labourers were handling the pipe. The complainant told Mr. Eldridge that the labourers should not touch the pipe at any time since that was pipe fitter's work. Mr. Eldridge who was "riled up" by the complainant's attempt to interfere with the respondent's standard procedure of having labourers unroll the plastic pipe, told the complainant, "If you think I am going to start doing their (the labourers') job, you're wrong!" Mr. Eldridge expressed his dissatisfaction with the complainant to Mr. Hopper, who was the foreman of the crew on which the complainant worked throughout his brief period of employment with the respondent. It was Mr. Hopper's evidence that the welder's complaint resulted in the aforementioned "little discussion" with the complainant in which Mr. Hopper asked him if he was willing to be a welder's helper. When Mr. Hopper subsequently reported this discussion to Mr. Dagg, and told him that they were having "too many problems" with the complainant, Mr. Dagg authorized Mr. Hopper to terminate the complainant's employment. It was Mr. Hopper's evidence that the complainant was dismissed because he was "too disruptive" and because there was "too much dissension".

16. Mr. Dagg testified that he made the decision to dismiss the complainant because he concluded from the information provided to him by Mr. Richmond and Mr. Hopper that the complainant was not doing what he was hired to do. It was his evidence that the "complainant was to be dismissed on Thursday night" (June 18th) but that "for some reason or other" it was not done then. Mr. Hopper told the Board that the reason the complainant was not dismissed on Thursday night was that a request had been made to Local 46 for a welder's helper to be sent to the site. He intended to dismiss the complainant when that welder's helper arrived but that did not occur because "no one came from the union". Since the complainant was absent from work on Friday June 19th, he was not discharged until Monday June 22nd.

17. The reason specified for the complainant's discharge on the "Record of Employment" submitted by the respondent to Employment and Immigration Canada was "shortage of work". However, we accept Mr. Dagg's evidence that this form was prepared by a clerk in the office without any specific instructions from management concerning the actual reason for discharge. We also accept the evidence of Thomas Johnstone, the President of the respondent, that it was not unusual for the respondent to indicate "shortage of work" as the reason for dismissal regardless of the actual reason, in order to avoid delaying the employee's entitlement to unemployment insurance benefits. However, management's explanation for the discrepancy between the reason for discharge specified in its reply to this complaint, namely, that the complainant was dismissed "due to his refusal to work as welder's helper, when no other work was available", and the reason specified in its answer to the complainant's grievance, namely, that the complainant "was unable to do the job he was hired to do from the Local", is less convincing. When confronted with this disparity, Mr. Dagg testified: "Unable or not doing, to me, is the same thing." Mr. Hopper, on the other hand, suggested that the words "unable to do the job he was hired to do" referred to the fact that the complainant "was



hired to be a spacer” and “the spacer’s job was over”. Mr. Johnstone, who dictated and signed the respondent’s answer to the grievance, told the Board that management was “tricked originally” because they “thought [the complainant] was a welder”. However, as readily conceded, the respondent “hired him anyway.” Mr. Johnstone asserted that the complainant “was unable to be a welder’s helper according to [the complainant’s] own statement.” However, it is clear from the evidence that the complainant was hired as a journeyman pipe fitter and was quite able to perform such work. Moreover, Mr. Hopper, who appears to have been the person who effectively recommended the complainant’s discharge, agreed with counsel for the complainant (during cross-examination) that the complainant “was fired because he was being disruptive and others wouldn’t work with him”. In the light of that testimony, his subsequent assertion that “the main reason” for the complainant’s discharge was that he “wouldn’t be a welder’s helper” gives rise to some legitimate scepticism. It is also not without significance that the reason for the discharge put forward by management to Mr. Weatherup, when he met with them to discuss the complainant’s discharge, was that the complainant “was always causing trouble and couldn’t get along with people”.

18. Counsel for the respondent contended that the complainant is a “professional litigant” who “has been before the Board before and will be before it again”. He further submitted that the complainant had deliberately created as many problems as possible on the respondent’s job site in the hope that he would be discharged so that he could launch this type of proceeding. However, the evidence does not support that contention. The fact that the grievor was discharged by another employer and that his bargaining agent referred a discharge grievance to the Board for determination pursuant to section 124 of the *Labour Relations Act*, which application was subsequently withdrawn by leave of the Board (see the Board’s unreported decision dated July 23, 1981, in File No. 2609-80-M) after the parties thereto achieved a mutually acceptable settlement of the grievance, does not provide the basis for any such inference. The respondent concedes that the complainant raised a legitimate safety issue with respect to the heating irons in question, as confirmed by the fact that the inspector issued an order pursuant to section 29 of the Act, which provides, in part, as follows:

“29(1) Where an inspector finds that a provision of this Act or the regulations is being contravened, he may order, orally or in writing, the owner, constructor, employer or person whom he believes to be in charge of a work place or the person he believes to be the contravener to comply with the provision and may require the order to be carried out forthwith or within such period of time as the inspector specifies.

Moreover, it appears that the complainant was acting within his rights as a union steward in questioning the jurisdiction of labourers to handle the pipe, an issue on the merits of which the Board will, of course, refrain from making any comment in these proceedings. Thus, if the complainant’s discharge was based in whole or in part on that matter, it might well be in contravention of sections 64 or 66 of the *Labour Relations Act*, which contravention could provide a basis for relief under section 89 of that Act (see, for example, *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). However, in the circumstances of this case, it is unnecessary for the Board to further pursue that matter since we are satisfied that the discharge, if not motivated by anti-union animus, was motivated by “anti-safety” animus. As stated by the Board in *Canadian General Electric Company Limited* [1981] OLRB Rep. June 616, the Act prohibits an employer from reacting with “anti-safety animus” to certain employee conduct (namely, acting in compliance with the Act or the Regulations or an order made thereunder, or seeking



the enforcement of the Act or Regulations) by taking action detrimental to the employee's interest, such as dismissing or threatening to dismiss the employee. (See also *AMS Diamonds*, [1981] OLRB Rep. Nov. 1534, and *Inco Metals Co.*, [1980] OLRB Rep. July 981.)

19. It is clear from the evidence that the complainant caused some disharmony within the crew during his second week of employment. His criticism of the welder's fusion technique, and his contention that pipefitters should handle the plastic pipe and should not permit labourers to touch it, clearly did not endear the complainant to the welder or to Mr. Hopper. However, having regard to all of the evidence and the submissions of the parties, and having particular regard to the fact that the decision to discharge the complainant was made shortly after he raised the safety issue which led to the loss of several hours of fusion time and also led to the issuance of a compliance order against the Company under section 29 of the Act, the fact that the immediate reaction of his foreman upon being apprised of the safety issue was to threaten to dismiss him, the fact that it was that foreman's input to Mr. Dagg which effectively led to the complainant's dismissal, and the fact that the respondent offered disparate, inconsistent explanations of what motivated it to dismiss the complainant, the Board finds that the respondent has not met the burden of proof imposed upon it by section 24(5) of the Act. For the foregoing reasons, the Board finds that the respondent contravened section 24 of the Act by dismissing the complainant worker because he sought the enforcement of the Act and the Regulations.

20. The evidence indicates that the complainant was unemployed from the date of his dismissal until July 16, 1981, when he went to work for another employer with whom he remained employed until late December of 1981. Thus, he is entitled to be compensated only for the period from June 22nd to July 16th. An order of reinstatement would not be appropriate since the project on which the complainant was employed has been completed by the respondent, which has no other current or planned projects within the territorial jurisdiction of Local 46.

21. In view of the limited period for which the grievor is entitled to receive compensation, it is unnecessary for the Board to consider the effect which his delay in filing this complaint might otherwise have had upon quantum of compensation (see, for example, *Auto Jobbers Warehouse Limited* [1981] OLRB Rep. Dec. 1715).

22. The Board therefore orders:

- (1) that the respondent fully compensate the respondent for all lost wages and benefits sustained by him from June 22, 1981, to July 16, 1981; and
- (2) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980.

23. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

### **DECISION OF BOARD MEMBER C. G. BOURNE;**

1. After considering the evidence I would find that the applicant was not dismissed for having filed a complaint under the *Occupational Health and safety Act*.
  2. I would also conclude that the failure of the union to process the grievance supports this contention. The present application was filed some six months later.
  3. I would dismiss the grievance.
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**1860-81-R** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. 387098 Ontario Limited and **Mandic Bros. Drywall and Const. Ltd.,** Respondents

**Related Employer – Alleged related company in business for several years before union obtained bargaining rights from employer – No erosion of bargaining rights – Attempt to extend bargaining rights without effort to organize – Board declining to exercise discretion to make related employer declaration**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and H. Kobryn

**APPEARANCES:** M. Zigler and H. K. Weller for the applicant; no one appearing for 387098 Ontario Limited; M. Goose and Mike Mandic for Mandic Bros. Drywall and Const. Ltd.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND H. J. F. ADE, BOARD MEMBER;** May 31, 1982

1. This is an application under section 63 of the *Labour Relations Act* with respect to the bargaining rights of the applicant Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America ("Local 675") as a result of an alleged sale of business by 387098 Ontario Limited ("the numbered company") to Mandic Bros. Drywall and Const. Ltd. ("Mandic Bros.").
2. Local 675 contends, in the alternative, that the Board should treat the numbered company and Mandic Bros. as constituting one employer for the purposes of the Act because they were carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the Act.
3. In either event, the applicant is seeking a direction that Mandic Bros. be bound to the two collective agreements to which Local 675 and the numbered company are bound, that is:

- (a) the collective agreement between the Interior Systems Contractors

Association of Ontario and Local 675 which expired April 30th, 1982 ("the ISCA agreement"); and

- (b) the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America which expired April 30th, 1982, to which Local 675 and the numbered company are bound as a result of a voluntary recognition agreement signed between them on or about January 13, 1981.

4. The Board heard neither evidence nor argument with respect to the application under section 63 of the Act and, therefore, insofar as the application pertains to that section it is dismissed. The balance of this decision deals with the alternative request of Local 675 that the two respondents be treated as constituting one employer for purposes of the Act.

5. Milan "Mike" Mandic appeared and testified on behalf of the respondent Mandic Bros. pursuant to the evidentiary onus under section 1(5) of the Act. While the Board heard the testimony of John Zdunic, the sole owner of the numbered company, he appeared only on the last of three days of hearings at the request of counsel for Mandic Bros. He did not participate otherwise in the proceedings and did not purport to represent the interests of the numbered company. Nor did he produce any documentary evidence pertaining to the ownership, direction or control of the numbered company. In these circumstances, the evidentiary onus established under section 1(5) has not been satisfied by the numbered company. Moreover, there were areas of conflict in Zdunic's testimony with that of Mike Mandic with respect to the relationship between the numbered company, Mike Mandic and Mandic Bros. Having regard to the nature of the testimony of these two witnesses, their demeanor and the fact that the evidence hereunder will show that Mike Mandic managed the operations of the numbered company insofar as they relate to the construction jobs at issue herein, the Board has accepted Mandic's testimony.

6. Mandic Bros. is engaged in the construction industry as a contractor for drywall installation. It was incorporated under the *Business Corporations Act* on April 7th, 1976. Mike Mandic, together with his two brothers Ivan and Marin are the equal and sole shareholders of the operation. They are also the only directors and Ivan is the president and Marin the secretary. Mike Mandic runs most of the daily operations, although, if two or more brothers are working on the same job, they share the supervision of the job and if they have more than one job running at the same time, they divide the responsibility for supervising those jobs between the three brothers. Mike arranges for the invoicing of clients for work performed by Mandic Bros..

7. Mandic Bros. maintains a small office and storage space at 929 Pantera Drive, Mississauga, although most of their business is conducted from their homes by themselves and the wives of two of the brothers who are employees of Mandic Bros.. The business records are maintained by the firm's auditor, Henry Slaby. The building at 929 Pantera Drive has 18,000 square feet of space, is owned by the three brothers personally and Mandic Bros. occupies approximately 1,200 square feet of that space. The only employees of Mandic Bros. are the three brothers and two wives. All other persons engaged to do the firm's drywall installation are engaged on a piecework basis and Mandic Bros. makes no statutory deductions and/or remittances for such things as income tax, Canada Pension Plan contributions and



unemployment insurance in respect of these persons. During the course of 1981, Mandic Bros. employed a total of 52 sub-contractors, although it seldom had more than seven or eight on any one job. At times it had more than one job running simultaneously. Mandic consistently referred in his testimony to these persons as sub-contractors. For ease of reference the Board will refer to them as such wherever that is necessary. In so doing, the Board does not bestow any particular significance to that term in respect of whether these persons are dependent contractors within the meaning of section 1(1)(h) of the Act. Mandic Bros. does an annual volume of business ranging between \$250,000.00 and \$500,000.00. The unaudited financial statements for its fiscal year ending August 31, 1981 shows total sales of \$509,838.00. The firm works primarily for two clients, a small contractor and another referred throughout the proceedings by Mike Mandic as "Inducon". At all material times, Mandic Bros. has operated its business as a "non union" contractor. It has never bid on union jobs and has no need to because of its two primary clients.

8. John Zduni operates a variety of companies in real estate and house building. He bought the numbered company "off-the-shelf" as a shell corporation from one of his lawyers or accountants. Prior to the circumstances set out hereunder which gave rise to this application, the numbered company had not carried on any business. There is no evidence as to who are officers or directors of the company and, while Mike Mandic was asked if he would like to be a director, he does not know whether he was ever made a director. Mandic and Zdunic have known each other since they came to Canada together fourteen years ago and are of the same ethnic origin. They and the other two Mandic brothers have, from time to time, engaged in common business undertakings. For example, Zdunic arranged for the building of the premises at 929 Pantera Drive and for the leasing of those premises on behalf of the three brothers to its major tenant. This was done without charge and, apparently in return, the numbered company occupies a small office space in the building which it uses as a mailing address. There is no lease between the brothers and the numbered company for his space and the numbered company pays no rent to the brothers. It has no telephone there and, in fact, does not have a telephone number. The three brothers personally, together with Zdunic, also own a property in Mississauga, the purchase of which was assisted by a \$8,000.00 interest free loan from the numbered company to the three brothers personally. The property is not used in any way in connection with the business of Mandic Bros. or the numbered company.

9. The first business conducted by the numbered company was as a sub-contractor to the Seaforth Group for labour only on the installation of drywall for a bank building at Warden and Steeles Avenue in the Borough of Scarborough. The job obtained by Zdunic, was valued by him at some \$24,000.00 to \$26,000.00. Work on the contract began just prior to Christmas of 1980 and was completed during February of 1981. When another friend of Zdunic's who was in the drywall installation business could not perform the job for the numbered company, Zdunic approached Mike Mandic and engaged him personally to undertake the job. Mandic brought with him Stip Bebic, one of Mandic Bros.' sub-contractors. The construction project was a "union job" and when Mandic advised Zdunic of this fact he was told to do whatever was necessary. It is uncontested that Mandic went to the office of Local 675 and, on behalf of the numbered company, signed the two documents referred to above; that is, the ISCA agreement and the voluntary recognition agreement. Mandic joined Local 675 and arranged for Bebic to do the same. He also hired two of the Local's members, James Moore and Lynn Kipen, who were referred by Local 675 to the numbered company to work on the project. Mandic, Bebic, Moore and Kipen were the only persons employed by the numbered company to work on the project. Bebic, Moore and Kipen

were told that they were working for the numbered company although there were no signs on the job indicating the company's presence. Mike Mandic used a Mandic Bros. van for his personal transportation while he worked on the job and it had that firm's name on it.

10. Mandic managed the job for the numbered company in return for payment of wages and a 15% share of the profit, although there is no evidence to support the fact that he was paid that share. A bank account was opened by the numbered company with Zdunic and Mandic having individual signing authority for the account. The account was in the same bank branch where Mandic Bros. maintains its bank account. Mandic signed all of the cheques issued against that account in respect of wages to himself and the other three employees of the numbered company on the bank job and he signed the cheques for income tax, and unemployment insurance and remittances. He prepared and signed the employer contribution reports required under the Provincial Collective Agreement and signed the cheques for the required remittances under that agreement. He did not prepare the returns for income tax, unemployment insurance and workmen's compensation, but believes them to have been prepared by the accountant who did the accounting work for the numbered company. The numbered company does not use the same accountant, Slaby, as Mandic Bros.

11. Subsequent to the bank job, the numbered company did no other work until August 1981. Mandic had suggested that Zdunic seek work on a couple of jobs and, when Mandic thought Zdunic was going to get the work, he ordered a couple of men from Local 675. The local referred, on Mandic's instructions, one person, Bruce Streight to a Mandic Bros. job site. Since the numbered company's job had not materialized yet and in order to keep Streight available, Mandic sublet to the numbered company a small job which was part of some work it was performing for Inducon at another site, the Airway Centre in Mississauga. Streight worked a total of 70 hours during August on that job and was paid by the numbered company on cheques signed by Mandic. Mandic also completed the required employer contribution report and signed and issued a numbered company cheque in payment thereof. Prior to filing the employer contribution report for the hours worked by Streight in August, Mandic had filed on behalf of the numbered company similar reports showing no employees for the months of June and July and later he filed "no employee" reports for the months of September and October. Mandic Bros. billed Inducon for the performance of this work but did not issue any payment to the numbered company, ostensibly because the work was a setoff against something Mandic Bros. had done for Zdunic.

12. When the anticipated job for the numbered company did not materialize at all, after Streight had worked for the numbered company on the Airway Centre job, he later worked on the same project for Mandic Bros. as a sub-contractor and on a second project as well. During 1981 he was paid slightly in excess of \$11,000.00 for work which he did on a piecework basis as a sub-contractor to Mandic Bros. Except for Mike Mandic, Streight and Bebic are the only two persons who were employed by the numbered company and worked also for Mandic, although as sub-contractors. Bebic was paid slightly in excess of \$12,000.00 for such work during 1981, some of which was for piecework which he did on Mandic Bros.' jobs during the same period of time when he was employed by the numbered company on the bank job. Bebic did not do any work for Mandic Bros. after June 1981.

13. Early in August of 1981, Mandic Bros. began work on another Inducon project, a retirement home in North York called The Gibsons. The work being performed by Mandic Bros. was completed by the end of 1981, with the exception of a small amount of drywall taping. Mike and his brother Ivan worked on the job and at various times had from two or



three to seven or eight sub-contractors working for them. Some of these persons had called Mike Mandic seeking work and others he called on recommendation of other persons. While Mandic was not aware whether any of these persons were members of Local 675, the applicant's own evidence indicates that on two separate occasions there were at least two of its members working as sub-contractors for Mandic Bros. on this project. Except for Mike Mandic, none of the persons who had been employed by the numbered company worked as sub-contractors for Mandic Bros. on the project. It was while Mandic Bros. was working on the project that Local 675 first became aware of this respondent.

14. It is on these facts that Local 675 asks the Board to find that the numbered company and Mandic Bros. are under common direction or control and therefore should be treated as constituting one employer for purposes of the *Labour Relations Act*. Counsel for Local 675 contends that these facts support the conclusion that the two respondents are under common direction or control because they reveal the existence of several factors which have been held by the Board to be significant indicators of such a relationship. According to counsel, Mike Mandic was the key man in both operations, particularly with respect to employee relations and job site supervision, and it was only through him that the numbered company became anything more than a shell corporation. The numbered company and Mandic Bros. occupy space in the same premises that are owned by the three Mandic Bros. The entire public identity of the numbered company is through Mike Mandic and Mandic Bros. There was an interchange of employees between the two respondents in the persons of Mike Mandic, who was an employee of both companies and Bebic and Streight, who were employees of the numbered company and sub-contractors of Mandic Bros. Counsel asserts that all of these factors are statutory elements for a finding of a section 1(4) relationship between the numbered company and Mandic Bros.

15. Were the Board to agree with counsel, the question would remain as to whether the Board should exercise its discretion to treat the two respondents as constituting a single employer for purposes of the Act. Counsel argues that all of the elements are present for the mischief which the section is designed to prevent and, therefore, the Board should declare the numbered company and Mandic Bros. as constituting one employer.

16. Assuming without finding that the pre-conditions have been met for a declaration that the two respondents are under common direction or control, the Board does not agree with counsel for Local 675 that it should treat them as constituting one employer. The purpose of section 1(4) is well described in the Board's decision in *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, at paragraph 11.

"11. Section 1(4) of the Act is designed to deal with situations where the economic activities giving rise to the employment relationships regulated by the Act, are carried on by or through more than one legal entity. Where such legal entities are engaged in related economic activities under common control and direction, the Board is entitled to "pierce the corporate veil" and treat them as one business or employer for the purposes of the Act. The legislature has determined that legal form should not dictate (and possibly fragment) the collective bargaining structure; nor should corporate restructuring undermine established bargaining rights. Because of section 1(4), those rights need not be treated as coextensive with the legal framework of the business, and to



this extent, labour law policy seeks to insulate collective bargaining from uncertainty at the inception of the bargaining relationship, or disruption should the exigencies of the market prompt the employer to change the number or form of the legal vehicles through which it carries on business. Each of these functions of section 1(4) was referred to by the Board in *Industrial Mines Installations Limited* [1972] OLRB Rep. Dec. 1029:

'Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al.* [1971] OLRB Rep. 406.

It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.'

But a section 1(4) declaration is discretionary. It is not intended to be an automatic response in every situation where its statutory preconditions are met. In determining whether that discretion should be exercised, the Board must have regard to both the mischief to which section 1(4) was directed, and the particular context under review."

17. While there has been some interchange between the companies of persons who do the drywall installation work, there is no evidence whatsoever that work which had been obtained by the numbered company was performed by Mandic Bros. and Mandic Bros. does not seek to obtain union jobs through the bidding process. In fact, quite the opposite occurred when Mandic Bros. diverted work to the numbered company in order to permit the numbered company to retain Streight in the event the jobs which it had anticipated getting came through. Moreover it was through Mike Mandic, whom Local 675 contends is the key man in both companies, that the local obtained its bargaining rights with the numbered company and it did so on a voluntary basis without having to conduct any organizing campaign. Nor did the numbered company attempt to circumvent its obligations under the Provincial Collective Agreement when it next did work, that is the work performed on the Airway Centre. On that occasion it paid Streight according to the terms of the collective agreement and made the contributions required of it to the welfare trust funds. It was only through the numbered company that Local 675 became aware of the existence of Mandic Bros. which had already been in existence as an incorporated business for 5½ years before the numbered company executed its first job in the construction industry. The facts in that respect parallel those in *Bramalea Carpentry, supra*. In that case the applicant trade union was seeking to have a non-union contractor, which the Board had found to be in a section 1(4) relationship with Bramalea, bound by a provincial agreement to which the union and Bramalea were bound. The non-union contractor had been in the construction business for eight years prior to the formation of Bramalea. About which circumstance, the Board commented in paragraph 12 that:

"Had the union been aware of [the non-union contractor] at the inception of the relationship, it would have had to do what it now claims is unnecessary; namely, demonstrate support among [the non-union contractor's] employees. Why should the passage of time improve its position? If anything, the passage of (eight) 8 years suggest that the Board should be reluctant to disturb the industrial relations status quo!"

That observation is entirely relevant to the facts in the case at hand.

18. In addition, facts herein show that during 1981 Mandic Bros. engaged some 52 persons as sub-contractors on its various jobs, whereas the numbered company employed only a total of five persons during that year. Even though Mandic Bros. seldom had more than seven or eight employees on any one job, the same facts also reveal that it sometimes ran more than one job at a time. The result of a section 1(4) declaration would be to sweep a potentially larger group of persons into the bargaining unit, assuming that they would be found to be employees within the meaning of the Act, and into union membership, assuming that the union would admit them to membership. In the alternative, it would serve to deprive these persons of the source of work which they have had from Mandic Bros.

19. The Board has been reluctant to apply section 1(4) so as to extend bargaining rights in view of the fact that it is designed to preserve them and the Board has often said that section 1(4) is not to be used as a substitute for certification. A recent example of this is found in *W.M.I. Waste Management*, [1981] OLRB Rep. March 409. In the instant case, Local 675 cannot be said to have lacked the opportunity of organizing Mandic Brothers. Not long before making this application, on each of two occasions when one of Local 675's business representatives visited The Gibsons project, there were two members of the local already at work for Mandic Brothers. There being no evidence of any erosion of Local 675's bargaining rights and Mandic Bros., the non-union employer, having been established in the business of drywall installation in the construction industry for 5½ years before any bargaining rights were created with respect to employees of the numbered company, the Board, in the absence of any compelling reason for rationalizing the collective bargaining relationship between Local 675 and the numbered company to include Mandic Bros., would not be prepared to exercise its discretion to issue a section 1(4) declaration even were it to find, as Local 675 contends, that the two respondents are under common direction or control.

20. One of the Board decisions cited by counsel for Local 675 in support of its argument that the Board should exercise its discretion to declare the two respondents to be one employer for purposes of the Act was *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436. That case is distinguishable from this one on this facts, particularly with respect to the degree to which the non-union respondent's identity was inter-twined with that of the unionized respondent, which respondent also substantially pre-dated the existence of the non-unionized respondent in the construction business.

21. For the foregoing reasons, the application is dismissed with respect to both sections 1(4) and 63 of the Labour Relations Act.

#### **DECISION OF BOARD MEMBER H. KOBRYN;**

1. This is a section 1(4) complaint that the two companies were engaged in the same type of construction business and are under common control and direction.

2. Facts in the case. Milan (Mike) Mandic is key man in both companies. Both companies use the same address, phone number and premises which are located at 929A Pantera Drive, Mississauga, Ontario. Both companies use the same bank branch and Mike Mandic wrote all the cheques for the numbered company. Mike Mandic took care of the Labour Relations and was the job supervisor for the numbered company. He also did the management functions and supervision for Mandic Bros. Mike Mandic is the brother with most of the expertise, he finds most of the jobs and signs most of the cheques and he is the key force behind both companies. Mike Mandic signed two collective agreements with Local 675 the ISCA Collective Agreement and the voluntary Recognition Agreement on behalf of 387098 Ontario Limited.

3. Under section 1(5) the Company did not totally meet its onus. Mr. Zdunic decided not to appear and after he did he brought no evidence about the numbered company and then declined to participate in the hearing. He left all activity dealing with Labour Relations and Drywall work to Mike Mandic. He had some concern about the financial arrangements but derived very few benefits from the profits of the numbered company.



4. The indicia or criteria which the Board considers relevant in making a determination under section 1(4) has been set out in *Walters Lithographing* case [1971] OLRB Rep. July 406, paragraph 21. This criteria is as follows:

- (1) common ownership or financial control,
- (2) common management,
- (3) interrelationship of operations,
- (4) representation to the public as a single integrated enterprise,  
and
- (5) centralized control over labour relations.

“No single criterion is likely to decide the issue. Rather, it has been stated, the Board’s determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it.”

- (1) *Common ownership or financial control.* This is not a case of common ownership and it is not necessary to be a key factor. In *Donald A. Foley*, [1980] OLRB Rep. April 436, paragraph 27 at 446-447 in part: “The most significant is the absence in this case of any ownership connection, either direct or through a third party, of any form of corporate inter-relationship including common directors, officers, solicitors or corporate familiar [sic] relationship between Foley and Kingston Aggregates”. Even though the key man is not a shareholder or there is no common directorship there was no documentation brought by Zdunic on this point. Zdunic felt that since Mike Mandic was asked to manage the company this was the same as being a director. Because of no documentation Zdunic did not satisfy the onus as required by section 1(5) so we have to draw a negative inference in that Mike Mandic is a director, authorized to sign the bank resolution and enter into a collective agreement with the union.

*Common financial control.* Financial arrangements between Mike Mandic and the numbered company were made verbally in that Mike Mandic would be paid a salary and be given a share of the profits. It was not necessary for Mike Mandic to obtain profits from the numbered company through dividends or capital gain. He got all the profit from this company through an interest free loan to engage in a real estate venture with Mr. Zdunic. The profits were not too advantageous to Mr. Zdunic because the financial benefits and profits occur to Mike Mandic and the Mandic Bros. who were all partners in this real estate venture. Mike Mandic has some financial control over Mandic Bros. There is no difference, this can be seen when he hired Bruce Streight for the Airway job of Inducon and the numbered company paid his salary and profits. Mandic Bros. bill

Inducon for the work and there was no interchange of money with the numbered company. Mike Mandic had full rein over the numbered company and Mr. Zdunic did not participate at all in the numbered company.

- (2) *Common Management.* Mike Mandic managed the bank project at Imperial Bank of Commerce for the numbered company. He managed it in every respect and ran the affairs of the numbered company. He signed the collective agreement, he received the bank statements, he signed the cheques he did the hiring and firing in the same way as he did at Mandic Bros. and not much evidence can be given that these employees were independent contractors, they were carrying out the work of employees. You have here a union company giving out work to subtrades which could be dependent contractors or employees under terms where Mike Mandic of Mandic Bros. negotiated the pay, estimated the jobs, prepared the bids and did the hiring and firing. Zdunic's testimony is that Mike Mandic did all the work for the numbered company and probably had another union job when Bruce Streight was hired. When the job was not a fact he was sent to work on the Airway Center of Inducon, Mike Mandic was the key man. The key man factor is dealt with in the *Kustom Insulation Ltd.* case [1979] OLRB Rep. June 531 paragraph 12 at p. 534.

"There are certain key areas, however, where Kustom is completely dependent on Mr. Schumann. He reads the blueprints and does the takeoffs which is a fundamental starting point in preparing a bid. Furthermore, Mr. Schumann alone has the practical knowledge and expertise required to supervise the work performed on the construction sites. Although Mrs. Schumann may technically carry the responsibility for firing employees, she must rely on her husband's assessment of an individual's capabilities. Furthermore, the Board concludes from the evidence that a large portion of Kustom's goodwill emanates from the reputation and expertise of Mr. Schumann. In view of all the evidence, Mr. Schumann cannot accurately be characterized as a mere employee."

In the case of the numbered company and Mandic Bros. the only person represented to anybody is Mike Mandic the key man.

- (3) *Inter-relationship of Operations.* The numbered company is totally without personnel, people, office or equipment. It is nothing more than a shell. Mandic Bros. supplied the address, the telephone number, the management, the expertise, the truck, the labour relations, negotiating ability, they did the hiring and firing and supplied some of the employees in the persons of Mr. Mike Mandic and Mr. Steve Bebic.

- (4) *Representation to the public as a single integrated enterprise.* The numbered company has no discernible identity. In the *Donald A. Foley* case the Board had this to say in paragraph 27 at p. 446:

“Another unusual feature of this case is the virtual absence of any public identity of Kingston Aggregates. While the Board occasionally deals with a section 1(4) case involving a party or parties the public identity of which is obscure (see for example *Del Zotto Enterprise Limited*, [1973] OLRB Rep. Aug. 533), in most instances the Board is dealing with circumstances where all the parties have some public identity unlike the situation before us where there is no outward appearance of Kingston Aggregates’ existence.

The numbered company is not known to anybody. Mandic Bros. is known in the industry. Employees know and the union knows and Burza said to Business Agent Redemeier that the numbered company and Mandic Bros. is all the same. One must ask why Redemeier would say the same thing, he is not versed in Corporate Law. He was bound to conclude this because he only saw one company. There is no outward sign that the numbered company is in business. There is no discernible difference to the public. Just as Inducon the General Contractor for the Airway job, did not know anything about the numbered company. Mike Mandic could hire someone for the numbered company and nobody would know the difference. Until such time he told some employees that it was not a union job. Then the employees complained to the union, this very thing happened on the North York Retirement Lodge “the Gibson”. This is the evidence of Redemeier when he visited this job no one said to him that he had no business on the job to look at the employees’ union cards. When he raised the matter with Mike Mandic about employer using the tools, Mike did not bother to explain that this was not a union job. Mike said when he talked to Redemeier they only discussed the economy in general. Mike also answered “no” when questioned if any union had made an application for certification with the Board. In fact, an application was pending before this Board by the Painters, for drywall tapers employed by Mandic Bros. He also said “no” when asked if he employed any union employees after the bank job. In fact, Ex. #7 Benefit Remittance Form dated Sept. 8/81 shows Bruce Streight worked in August for the numbered company on the office building being built by Inducon. He also said the Mr. Zdunic sent him to the union to sign the collective agreement. Zdunic testified that he never knew anything about the union and was not aware that the bank job was a union job and did not suggest to Mandic to be union and could not recall any discussion with Mike about union and if it was discussed it was not an important matter to him. These few facts, question the credibility of Mr. Mike Mandic. Mike Mandic took advantage of the numbered company’s lack of identity when he



entered into a collective agreement with the applicant; this way he could maintain a union and non-union operation. He thought he had a union job when he ordered Bruce Streight from the union. Gave the union the name of two jobs, Airway and Minnesota Court. When he did not get the union job, had he sent Streight back to the union because he had no work for him, then the union would have found out he was using two companies.

- (5) *Centralized control over labour relations.* Mike Mandic was the key man. He hired, fired, signed collective agreements and the cheques for the payment of employees.

5. On the question whether the Board should exercise its discretion in this case Zdunic said he could fire Mike Mandic. Mandic was more than an employee, he was involved with Zdunic in joint ventures, some personal and some for the numbered company. He was the most senior employee of the company and had the authority to bind that company. The union never asked Mandic if he had another company nor was Mandic forthright to tell them. A union entering into a bargaining relationship especially if the employer who is coming in and wants an agreement expects the bargaining relationship will be for that employers' entire enterprise. As to the charge that the union permits its members to go out and sub-contract work. Article 3.03 of Ex. #1 the Collective Agreement states "that no member is permitted to contract work unless he be bound by the provisions of this contract." An employee referred by the union to the numbered company and Mike Mandic made arrangements with employee to work for Mandic Bros. on piecework. The applicant said it does not approve or condone this. Rememeir admitted that it exists but it's not anything the union gives its blessing to, such a practice is contrary to the principles of the union.

6. Counsel for the respondent stated that it was not the intention of the Act to make a non-union company into a union company. The purpose of section 1(4) is clearly stated in the *Industrial Mine Installation* case [1972] OLRB Rep. Oct. 1029, paragraph 9 at p. 1031 states as follows:

"Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies any given time may be impossible to ascertain."

7. Mr. Bebic and Mr. Streight worked for the numbered company immediately after working for Mandic Bros., this was an interchange of employees. Streight returned to the same job site to do the same work. In this way union bargaining rights are eroded away. Bargaining relationships will have no meaning in the future because the same people covered by a collective agreement work for the other company which is not bound to a collective agreement.

8. Counsel for the respondent contends that the union is trying to use section 1(4) instead of getting certified for Mandic Bros. The *Atlantic & Pacific Company of Canada Limited* case, [1981] OLRB Rep. Mar. 285, paragraph 15 at p. 289 deals with this subject matter as follows:

"We have considered the respondent's arguments with respect to "foisting" a union upon a group of employees who may not wish to be represented; however, we do not think that the wishes of the employees are the only, or even the predominant factor to be considered in a section 1(4) application. If such were the case, the very erosion of bargaining rights which triggered the proceeding, (and which section 1(4) was designed to cure) could be raised as a bar. It is entirely typical that the employees of a related company will not be union members for it is the creation of job opportunities ostensibly beyond the scope of the collective agreement which constitutes the "erosion" of the union's bargaining rights. But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one. Nor do we think we can attach much significance to the fact that upon learning of the existence of a related employer, a union opts to utilize section 1(4) rather than apply for certification. The statute contemplates both types of applications, and if the circumstances are such that section 1(4) can be applied, we do not consider it a proper exercise of our discretion to raise a bar simply because a union might have applied for certification. Indeed, if the two corporate entities otherwise satisfy the requirements of section 1(4), there are good labour relations reasons for making a section 1(4) order so that the collective bargaining structure will accord with the economic and industrial relations reality."

9. In this case some employees were union, Bebic and Streight represent 50% of the employees of the numbered company. In such a small company, the numbers in terms of interchange are significant. Particularly in the construction industry, numerous companies are used and interchanging is easily done because it's very easy to close one business down and start another, this is clearly stated in the *Brant Erecting* case [1980] OLRB Rep. July 945, paragraph 13 at p. 948 which states as follows:

"The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously: and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55. This is especially the case in the construction industry where many of the employees will not have permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment, a labour force as required *after* it has made a successful bid. . . . In such circumstances there may be an effective transfer of business between related

businesses without any apparent disposition of assests, inventory, tradesmen, goodwill, employee, etc.”.

10. The risk of future erosion of bargaining rights exists from the opportunity for Mandic Bros. to use the dual vehicle and tell General Contractors that they will perform the work through a union vehicle and then do it by the non-union vehicle. There is a risk of erosion of bargaining rights because Mandic is looking for other work for the numbered company. This is referred to in the *Donald A. Foley* case [1981] OLRB Rep. Apr. 436 at page 447 the Board has this to say in part of paragraph 28:

“The question now is whether the Board should exercise its discretion under section 1(4) to declared that the two companies constitute one employer for the purposes of the Act. One of the significant purposes of section 1(4) is to protect bargaining rights gained by a trade union from being eroded by work being diverted by one means or another from an unionized business to a related non-unionized one. One of the results of the total relationship between Foley and Kingston Aggregate is that Foley can go projects as a “union” contractor and through Kingston Aggregates perform work with non-union labour with no visible indication of Kingston Aggregates’ presence on the project. At the same time, it permits Kingston Aggregates to operate under Foley’s umbrella and gain access to large jobs which it would not otherwise be able to do. A potential effect of this practise is to erode the bargaining rights of the applicant. The Board does not have evidence before it that such erosion has taken place, although a strong inference exists from the fact that Foley employed an average combined force of 15 engineers and labourers in 1979 while Kingston Aggregates had a work force of some 30 to 55 employees. It is true that similar risk of erosion would result from Foley entering into a bona fide, arms-length relationship with another non-union contractor and section 1(4) could not protect the applicant. The fact is that it is Foley’s control of Kingston Aggregates, a firm carrying on related business, which presents the risk of erosion of the applicant’s bargaining rights. It is not necessary for there to have been an actual erosion of those rights before the Board exercises its discretion. As the Board stated in *Kustom Insulation Ltd.*, [1979] OLRB Rep. 531:

‘It is not necessary, however, for the union company to fall apart before concluding that an employer’s scheme of operating a business through a union and non-union company has undermined a union’s bargaining rights.’

While the respondents argue that there was no scheme or intent to avoid or dilute the applicant’s bargaining rights, it is the reality that erosion has resulted or that there is a risk of erosion of bargaining rights which may cause the Board to exercise its section 1(4) discretion to remedy the situation. In this case the applicants have acted promptly upon learning of Kingston Aggregates’ existence to bring these applications before the Board and the Board concludes that in all the circumstances of this case, it is an appropriate one in which to exercise its discretion and grant a declaration.”



11. As in this case the union did not sleep on its rights, on November 9, 1981. Business Representative Redemeier visited the North York Retirement Lodge ("the Gibson") project of Inducon and for the first time discovered some employees who were not members of the applicant and as a result discovered that the employer was not the numbered company but rather Mandic Bros. Representatives met with Mr. Mike Mandic on the Project on November 19, 1981 to resolve the problem. When unable to do so filed the complaint with the Board on November 26, 1981.

12. Either by omission or silence, the employer was able to convince the union he had only one company and that it was the numbered company. When the union Business Representative came on the job site, the employees indicated to him that they were working for a union company. The one employee who knew of the numbered company thought it and Mandic Bros. were the same. Everything Mandic did pointed towards one company and the union relied on this conduct to their detriment. It took an incident to discover that there were two companies under the effective control of Mr. Mike Mandic.

13. The Board should conclude that in all the circumstances of this case, it is an appropriate one in which to exercise its discretion and grant a declaration under section 1(4) that 387098 Ontario Ltd. and Mandic Bros. Drywall & Construction Ltd. are one employer for the purposes of the Act.

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**2622-81-M Corporation of the City of Sarnia Marshall Gowland Manor, Employer, v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Trade Union**

**Arbitration – Reference – Discharge grievance filed – Whether only grieving party having access to expedited arbitration provision – Board interpreting section 45 – Finding both parties to agreement have access to expedited arbitration – Whether Minister can revoke appointment**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W.F. Rutherford and W.H. Wightman.

**APPEARANCES:** *F. G. Hamilton, J.A. Barker and P. Jarvis for the employer; J. Hayes and D. Starkman for the trade union.*

**DECISION OF THE BOARD:** May 5, 1982

1. This is a reference under section 107 of the *Labour Relations Act* concerning the authority of the Minister of Labour to appoint an arbitrator under section 45 to hear the discharge grievance of Ms. C. Mills, a member of the trade union. The reference raises an issue of first impression, namely: whether the expedited arbitration procedure prescribed by section 45 is only available to the grieving party (i.e. the party initiating a grievance alleging a breach of a collective agreement) or whether, once such grievance is filed, either party to the collective agreement can invoke section 45. The relevant portion of section 45 reads as follows:

“45(1) Notwithstanding the arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, *a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.*

(2) Subject to subsection (3), *a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.*

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.”

(emphasis added)

2. The arbitration procedure now set in section 45 became part of the *Labour Relations Act* in 1979. Before turning to its interpretation, it may be useful to refer briefly to the “problem” or “mischief” to which it is directed.

3. Arbitration of grievances alleging a breach of a collective agreement is an integral part of the labour relations system in this Province. Parties are compelled by statute to resort to arbitration for the resolution of all such disputes. There can be no strike or lock-out during the currency of a collective agreement. The collective agreement is a “peace pact” for its term of operation.

4. As originally envisaged, arbitration was to be an expeditious, inexpensive, and relatively informal alternative to both industrial conflict, and the more cumbersome process of civil litigation. But over the years, the arbitral jurisprudence became increasingly complex. Grievance arbitration became a highly specialized aspect of labour relations law. And as the process became more refined and sophisticated, it also became more expensive and time consuming.

5. The expense and delay in the arbitration of grievances was of particular concern to trade-unionists, who were usually cast in the role of the grieving party, seeking modification of an employer action alleged to be a breach of the agreement. Union discontent took a variety of forms. In the construction industry, where employer-employee relationships are transitory, it

not infrequently resulted in “wild cat” strikes. Such strikes were illegal, of course, but reflected an employee concern that the arbitration process was simply too slow. In the special circumstances of the construction industry, an arbitration award, several months after the precipitating event, would be entirely academic. To meet this problem, the Legislature enacted what is now section 124 of the *Labour Relations Act* providing access to this Board for the resolution of construction industry grievances, and providing that a hearing can be obtained within 14 days.

6. Discontent about the cost and delay seemingly inherent in the arbitration process was not restricted to unions in the construction industry. In the mid-1970's, the Labour Council of Metropolitan Toronto published a study entitled “*Justice Delayed — The Arbitration Process in Ontario*” which was sharply critical of the existing system and urged legislative change. In 1977, Mr. Justice Arthur Kelly was appointed by the Minister of Labour to conduct an inquiry into the working and possible reform of the grievance arbitration process; and after the release of his Report, the discussion and debate continued. Section 45 was the legislative response. (See *Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration under the Labour Relations Act and the Hospital Labour Disputes Arbitrations Act*, 1978).)

7. The thrust of section 45 is obvious. It provides a speedy and less expensive method of resolving disputes between the parties, while preserving and encouraging the prospect of a settlement short of arbitration. When called upon, the Minister of Labour can appoint a single arbitrator to hear a grievance within 21 days after the exhaustion of the grievance procedure, or 30 days from the filing of the grievance, whichever first occurs. In the case of a grievance involving a termination of employment, the arbitration hearing can come on even more quickly. The issue then is whether this streamlined procedure is available in any grievance to both parties to the collective agreement; or whether it is only the grieving party which can take the benefit of section 45.

8. The trade union argues that only the grieving party should be entitled to invoke section 45 since, in its submission, section 45 was intended to minimize the prejudice to *grievors* (usually the union or employees) associated with delay. In the union's submission, the “respondent” or “defendent” should not have a right to divert the grievance into the expedited route. The union contends that if that option were open to a “respondent” employer, the union might be put at a procedural disadvantage if the evidence requires more thorough preparation than could be done within the tight time limits prescribed by section 45. Under that section, a hearing could come on within weeks of the event precipitating the grievance; and in some cases, that is simply too fast to permit adequate investigation and preparation. The union asserts that it should not be pressured to go to arbitration with cases that could be settled if it were given a little more time to evaluate its position. An expeditious hearing should not be purchased at the expense of a more thoughtful consideration of the underlying labour relations problems.

9. On a practical (or tactical) level, counsel expressed concern about the financial implications to a grieving party (again, usually the union) if the other party were in a position to obtain a speedy hearing. The apparent practice of arbitrators appointed is to fix a hearing date immediately and to charge a cancellation fee even if the case is settled (as it often is) without proceeding to a hearing. The union's concern is that it can incur a financial liability almost automatically, whenever the Minister of Labour appoints an arbitrator under section



45. The union argues that if such liability is to follow so swiftly upon the filing of the grievance, it should at least be the grieving party who decides whether it should be incurred. Otherwise, in the union's submission, an employer could "penalize" the union and discourage grievances by simply opting in every case for the expedited process. In so doing, it would generate a deterrent cost which might not be applicable if the grievance followed the usual and more leisurely route. Finally, the union notes that the principal issue between the parties is the propriety of the employer's "call-in" policy, and that this issue is already before another Board of Arbitration constituted pursuant to the terms of the parties' collective agreement. The grievor Claudia Mills was disciplined and subsequently discharged for failing to abide by that policy, and in the union's submission, it would needlessly multiply proceedings and create a possibility of inconsistent findings if the cases were "split" — with one panel seized with the policy and discipline matters, and another seized with the ultimate discharge.

10. The employer argues that section 45 should not be construed so narrowly. Expedition is not solely the concern of the grieving party. It is in the interest of both parties that disputes be settled quickly. The accumulation of unresolved grievances can poison a collective bargaining relationship, contribute to friction in the workplace, and cast an added burden upon the collective bargaining process. Nor are the grieving employee's interests the only ones potentially affected by a complaint. Until the complaint is resolved, the employer faces the prospect of mounting liability and other employees in similar circumstances may also be affected. In the case of seniority grievances, (i.e. promotions, lay-offs, transfers, etc.) the rights of a variety of other employees may be contingent upon those of the grievor. The employer acknowledges that both parties should have an adequate opportunity to investigate a problem, evaluate the situation, and pursue settlement efforts; but there is also some merit in considering a case while the evidence is fresh. And on a more general level, grievances should not be filed at all unless there is an arguable basis that there has been a contractual violation. It is not unreasonable in most cases to expect a grieving party to investigate and prepare its case within the time limit prescribed by section 45, and in unusual cases where the complexity of the evidence or the availability of witnesses makes this difficult, the matter of an adjournment can be considered by the arbitrator and granted in such circumstances, and on such terms, as he considers appropriate. In response, to the union's contention that resort to expedited arbitration may occasionally give an employer a procedural advantage, the employer notes that, from time to time, the union itself seeks to utilize the grievance procedure as a means of harassing an employer. (See for example: *Bell Canada* 27 LAC (2d) 104, and *Inco* 23 LAC (2d) 424.) The option of referring such vexatious grievances to arbitration was characterized as a useful antidote which discourages such frivolous conduct and preserves the integrity of the grievance-arbitration procedure.

11. While the union's concerns are sincere, and not entirely without foundation, we find that the employer's submissions are much more compelling. We see little justification on policy grounds for limiting access to the expedited arbitration procedure or the settlement officer appointed pursuant to section 45(6). Nor, in our view, does a review of the background to section 45 support such proposition. There may be tactical advantages or problems for one party or the other in particular cases, but in our view, an arbitrator has ample authority to ensure that both parties receive a fair hearing, and we do not think the hypothetical problems posed by counsel for the union should obscure the obvious legislative intent of section 45: that arbitration cases should be heard quickly. Such expedition is beneficial to both the parties and the affected grievor(s); and we would be reluctant to restrict access to that procedure in the absence of clear statutory language to support that position. Indeed, the facts of this case

illustrate the problem that can arise if a matter of general concern to employees is not settled quickly. the underlying dispute between the parties involves the propriety of an employer policy which the trade union challenged by a "policy grievance" on February 5, 1981. The case did not come on for a hearing until February 3, 1982. Meanwhile, the employees were faced with the dilemma of complying with a policy alleged to be illegal, or refusing to comply (as the grievor C. Mills appears to have done on several occasions) and face the possible imposition of discipline. It appears to the Board that this is the very mischief that section 45 was designed to avoid; and had either party wished to clarify the matter by referring the problem to expedited arbitration, we see no reason why it should not have been able to do so. The union argues that the reference of the Mills discharge grievance to a single arbitrator under section 45 creates an additional proceeding involving similar issues; but it might equally be observed that the failure to resolve the underlying problem in the expeditious fashion which section 45 makes possible has resulted in the latest grievance.

12. Subsection 1 of section 45 creates the substantive right to invoke the expedited arbitration process. That subsection is clear and unequivocal. The right of referral is accorded to "a party to a collective agreement". Looking solely at section 45(1), the meaning is plain: either party may invoke the speedy procedure. Moreover, as we have already noted, it is our view that this is entirely consistent with the legislative intent.

13. The thrust of section 45(3) is equally clear. That section envisages an even faster arbitration process for discharge cases which work a special hardship on the discharged employee who remains unemployed and without income while his case is pending, yet is unable to seriously seek alternative employment until his right to reinstatement is settled. Under section 45(3) a "difference respecting discharge from or other termination of employment" will only be brought at the instance of a trade union (or sometimes an employee); yet the language is the same as in section 45(1). It accords the right of referral to the expedited process to "a party to the collective agreement". Once again, this suggests that it is open to either party. It would have been easy for the Legislature to refer to "the grieving party" or "the union" if that were its intention. The latter term is used liberally throughout the statute, and could easily have been used in section 45(3) if it were intended that only the union (which we repeat will necessarily be the grieving party in discharge cases) could invoke section 45(3). But the words "a party to the collective agreement" are not qualified in any way which might be construed as restricting them to the trade union party to the collective agreement.

14. The only possible confusion that arises involves the words "to the attention of the other party" which appear in both sections 45(2) and 45(3). These words are used in what might be described as the "secondary" time limit, applicable in the event that the grievance procedure is not exhausted within 30 days. The union argues that the words "other party" must be read to limit the general words "a party" in the first line of section 45(1). Thus, in this case, it is the union as initiating party which brought the grievance to the attention of "the other party" — here the employer. By juxtaposing "a party" in line 1, and "the other party" in line 5, the union argues that the former must be limited in meaning to the grieving party — here the union.

15. The employer argues that the limitation period in section 45(2) should not be construed as restricting the substantive right created by section 45(1). The limitation in section 45(2) must be read in light of its purpose: to mark time either in relation to the grievance procedure, or with reference to the initiation of the grievance itself. To do the latter, the

Legislature has adopted a bench-mark established by the “time at which the grievance was first brought to the attention of the other party”. This verbal formulation was not intended to define or restrict the parties’ rights, but merely to identify the time frame in which they were to be exercised. In the instant case, time started running when the grievance was brought to the attention of the employer; but subject to this procedural limitation, the employer argues that *either* party to the collective agreement could avail itself of section 45(1).

16. The statutory language is not as clear as it might be, but on balance, the Board favors the interpretation advanced by the employer. The employer’s proposed interpretation is a reasonable construction of the language of section 45, and in our view, it is much more consistent with the intention of the section than the alternative proposed by the union. We see no reason why the right to obtain a speedy resolution of contract disputes should be vested solely in the party initially raising the problem. We conclude therefore that (subject to the above-mentioned time limitation) *either* party is entitled to resort to the expedited arbitration procedure prescribed in section 45.

17. Having regard to the foregoing, the Board respectfully advises the Minister of Labour that, in its opinion, he has the authority to appoint an arbitrator pursuant to section 45 upon the request of *either* the trade union or employer party to the agreement upon which a grievance is based.

18. During the course of argument, the parties raised an additional question: whether having appointed an arbitrator under section 45, the Minister can revoke that appointment while his jurisdiction is being considered by the Board. In this case, the purported revocation came *after* the arbitrator accepted the appointment and convened a hearing (which was adjourned sine die on the agreement of the parties). The employer argues that the arbitrator was properly appointed in the first instance and that once he is “seized” of the case, the Minister has no authority to revoke his appointment.

19. This subsidiary question raises issues of some difficulty. It would be odd if an arbitration proceeding could be truncated by the revocation of an arbitrator’s appointment after a hearing had been convened; but it would be equally undesirable if the Minister could not act to preserve the status quo pending resolution of a question concerning his jurisdiction, or act to rectify the administrative or other errors which occasionally occur. And is an arbitrator who merely accepts the parties’ agreement to adjourn a matter sine die irrevocably “seized” with their dispute? What if for one reason or another he were unable to act? There are sound practical and labour relations reasons why revocation and reappointment powers should be implicit in the power of appointment itself, so that the statutory objective may be appropriately accomplished. (For an example of the problems which can arise subsequent to a Minister’s appointment, and the need for some flexibility in the exercise of his powers, see: *Stanley Steel Company Limited* [1977] OLRB Rep. April 233.) However, the question of the Minister’s power to revoke, suspend or reappoint was *not* referred to this Board for its opinion. Any expression of opinion by the Board would not only be gratuitous, but could easily be academic as well. It is by no means clear that either party would object if the original arbitrator, (who in our opinion was properly appointed) continued with the hearing pursuant to the original appointment if the Minister’s power is irrevocable, or pursuant to a new appointment if it is not. Accordingly, the Board declines to address the matter further.



## DECISION OF BOARD MEMBER W.F. RUTHERFORD;

1. I agree with the result reached by the majority in this matter and, in general, with its reasoning. I am concerned however, about one aspect of the union's submissions: that arbitrators are charging substantial fees even if the case is settled and never proceeds to a hearing. If one of the objects is to settle the case *before* arbitration, it seems to me that it is not very helpful if a grievor has to incur the cost of arbitration whether he goes to arbitration or not. It does not seem consistent with the purpose of the section if the parties have to pay for settlements. I can also see how this practice of arbitrators could be abused, and could deter employees from filing valid grievances. It might be noted that the Labour Relations Board does not charge parties in the construction industry unless the case actually proceeds, and it should also be remembered that resort to arbitration is compulsory under the Act. A worker has no other choice. It would be unfortunate if employees were discouraged from filing valid grievances because the cost of arbitration will be incurred even if it is not resorted to. However, none of this has anything to do with the Minister's power of appointment under section 45. If cancellation fees are too high, it is a matter which can be regulated under section 45(10).

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**1783-81-R** Antonio Fiorenza & Ron Manzolini, Applicants, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Respondent, v. **National Dry Company Limited**, Intervener

Adjournment – Practice and Procedure – Reconsideration – Witness – Witness on subpoena not available – Respondent union not attempting to obtain another witness – Board not reconsidering denial of adjournment – Effect of Board summons reviewed

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

## DECISION OF THE BOARD; May 4, 1982

1. This is an application for a declaration terminating bargaining rights. The Board by decision dated March 10, 1982, found that the petition in support of the application was voluntary, and directed the taking of a representation vote. The respondent by letter dated March 16, 1982, then requested reconsideration of the Board's decision, and in particular the Board's ruling at the hearing that it would not grant the respondent an adjournment for the purpose of calling further evidence. The representation vote proceeded as scheduled, with no one attending on behalf of the respondent, and the Board directed that the ballot box be sealed.

2. The respondent's request for reconsideration reads as follows:

I have now received a copy of the decision of the Board dated March 10, 1982.

The applicant hereby requests pursuant to the provisions of Section 106, sub-section 1 of the Ontario Labour Relations Act for a reconsideration of its decision in order to hear evidence of the witness Julio Carvatta, the person referred to in the Board's decision.

As indicated, this person was under subpoena, and in the normal course of any hearing, the subpoena, as I understand the Board's practice is to continue from day to day until witnesses' evidence is taken and he is released from the Board.

The comments of the Chairman of the Board indicated that since Mr. Carvatta was not in the hearing room due to the order excluding witnesses, he would not have been subject to the order of the Board and therefore the continuation of the subpoena is invalid.

I understand that Mr. Carvatta is returning from his vacation imminently and on behalf of my clients, request that the Board do reconsider its decision in order that it may hear the evidence of Mr. Carvatta, to indicate that the application was in fact tainted by the hand of management.

This submission is made and should be considered by the Board, regardless of whether or not he is the sole contact in the National Dry Section of the Local Union. An offense by the employer in interfering in the administration in the Union constitutes an offense under the Act, whether or not the Board considers that the evidence of this witness is the only witness available to give this evidence.

If Mr. Carvatta's evidence goes to show that in fact management did in some way influence the presentation of the petition, and the attempt to remove the Union as the bargaining agent, this is evidence that, with respect, should properly be heard by the Board since it is unquestioned that the person whose evidence was required was under subpoena at the time.

For these reasons, I would appreciate an early response to this request and that the taking of the vote and the establishment of the voting community, be withheld until such time as the request for reconsideration and subsequent hearing, has been completed.

3. As the respondent makes reference to the Board's practice in continuing the effect of one of its "Summons to Witness", the Board might briefly review its practice in that regard. The effect of a Board summons can, as the respondent points out, be continued from day to day as a hearing progresses, without the need for re-issuing or re-serving a Summons, subject to the following provisos:

- (a) the required amount of conduct money for attendance and travel must be paid for *each* day of attendance, and

- (b) the witness must receive *official* notification of the time and place of continuation.

Requirement (b) may be met on the face of the summons itself, or it may be met by the Board prior to adjourning the hearing advising the witness of the next scheduled date. When a hearing is adjourned *sine die*, however, the Board is obviously not in a position to accommodate the summoning party by following the latter procedure. See *Sentry Department Stores Limited*, [1964] OLRB Rep. Feb. 642. This was in fact the situation in the instant case, and it is clear that the witness in question had been placed under no legal obligation, in the absence of fresh service, to attend the final day of hearing, scheduled after the prior hearing was adjourned.

4. The Board did not, however, rest its adjournment ruling on this aspect of the case, either at the hearing or in its written decision. The Board's reference to the respondent's failure to make every reasonable effort to place its evidence before the Board on the final day of hearing included the respondent's admission that it took no steps at all to obtain another witness to the event in question. That event was a meeting purportedly attended by all of the employees in the bargaining unit. The respondent's explanation for its inactivity was that Mr. Carvatta, who was the individual departing on vacation, was the respondent's "only remaining contact with the bargaining unit". While the Board recognizes that the respondent's task in the circumstances might have proved difficult, it would not, with the whole bargaining unit that it represented to draw from, necessarily have been fruitless. Rather, the respondent appeared to the Board to have been content to sit back and take its chances on the Board granting an adjournment. Given the particular commitment of all parties to the proceedings to the completion of the matter on the final day scheduled for hearing, as discussed at the time of scheduling, the respondent must have been aware that it was proceeding as it did at its peril. The Board in the circumstances reaffirms its decision to deny the request for adjournment, and the request for reconsideration is dismissed.

5. The Registrar is directed to proceed with the counting of the ballots.
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**0032-82-M Ontario Erectors Association, Incorporated, Applicant, v. International Association of Bridge, Structural and Ornamental Iron Workers, Iron Workers District Council of Ontario, Interveners.**

**Reference – Request for amendment of employer bargaining agency – Employer bargaining agency incorporating itself – No prejudice to designated bargaining agents or to collective bargaining process – Board consenting to amendment**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members C. A. Ballentine and J. D. Bell.

**APPEARANCES:** *Robin B. Cumine and William Jemison for the applicant; B. Fishbein, N. Wilson and J. Phair for the interveners.*

**DECISION OF THE BOARD; May 18, 1982**

1. This is a reference to the Board by the Minister under section 139 of the *Labour Relations Act*, respecting a request for the amendment of an employer bargaining agency designation in the construction industry.

2. The applicant is a corporation without share capital, incorporated by letters patent under the *Corporations Act*, R.S.O. 1980 c. 95 on February 23, 1981. The material filed and the unchallenged representations before the Board establish that the Ontario Erectors Association (OEA), a designated employer bargaining agency, established the applicant corporation as a means to facilitate normal business transactions. It appears that as an unincorporated association the OEA could encounter practical difficulties because of its lack of status as a legal entity. It could, for example, encounter difficulties dealing with a landlord who would be willing to execute a lease only with a legal personage, or in other commercial transactions with parties who prefer to do business with a clearly suable entity. By the same token, it felt that its own capacity to function would be enhanced if it gained the corporate status that would give it a clear right to contract and institute legal actions in its own name. While most of these benefits would accrue outside the collective bargaining sphere, from a practical standpoint the association viewed incorporation as a means to better discharge its obligations as a designated bargaining agent.

3. There appears to be nothing novel in the applicant's proposition. It filed before the Board the corporate returns for 1982 of 24 other incorporated associations which have been made designated employer bargaining agencies under the Act. Most of them have been incorporated since the early 1970's, presumably to better discharge their obligations as accredited bargaining agencies under the then current legislation. A number of them, however hold letters patent that substantially pre-date that period. There appears, therefore, to be nothing new in the concept of a designated employer bargaining agency having the status of a corporation without share capital. The unique dimension in the instant case is that it appears to be the first time an unincorporated association has become incorporated after the designation order and has sought to amend the order accordingly.

4. The incorporated status of the applicant appears to cause no prejudice to the designated employee bargaining agents or to the collective bargaining process contemplated under the Act. Counsel for the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario, the two

corresponding employee bargaining agencies for structural iron workers, advised the Board that he had examined the documents of incorporation, had satisfied himself of their regularity and did not oppose the application for an amendment to the employer bargaining agency designation. He commented that he did not contemplate any adverse impact on the rights or interests of the designated employee bargaining agencies if the designation should be amended to vest in the applicant corporation.

5. The evidence submitted establishes that the incorporated association has all of the capacity requisite for the fulfillment of the obligations of a designated employer bargaining agency under the Act. Its application for letters patent contains the same objects of incorporation as are found in the constitution of the association, including the object of acting as bargaining agent for its members. The objects so described have been incorporated into the first by-law of the corporation. The corporation has nine directors as well as executive officers, all of whom have the same office and title in the unincorporated association. The Board is satisfied that the applicant corporation has the full capacity to function as a designated employer bargaining agency. If anything its corporate status should enhance its ability in that regard.

6. The success of this application will not immediately put an end to the role of the unincorporated OEA. As an accredited employer bargaining agency under several outstanding accreditations it will continue to discharge obligations relating to ongoing bargaining relationships in the heavy engineering sector. Counsel for the applicant advised the Board that if this application should succeed, there being no provision for the transfer of accreditation rights, the association and the corporation will apply to the Board for a reconsideration of the accreditation orders by which any outstanding accreditations can be made to vest in the corporation.

7. There is nothing in section 139 of the Act which either expressly or by implication would prevent a corporation without share capital from gaining the status of a designated employer bargaining agency. As the evidence establishes, a good number of such corporations have attained that status and have discharged their obligations without apparent difficulty. In the light of the foregoing the Board is satisfied that the purposes of section 139 of the Act and the interests of collective bargaining in the construction industry will not be adversely affected if the Minister should accede to the application. The Minister is respectfully advised accordingly.

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**1054-81-M** The Ontario Allied Construction Trades Council on behalf of United Brotherhood of Carpenters and Joiners of America, Local 2222, Applicant, v. **Ontario Hydro**, Respondent.

**Construction Industry Grievance – Whether Reporting pay clause applies to work performed on Sunday**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

***APPEARANCES:** Michael A Church, Bryon Black and Don McIntyre for the applicant; Ross Dunsmore and Gerry Knight for the respondent.*

**DECISION OF VICE-CHAIRMAN D. E. FRANKS AND BOARD MEMBER J. D. BELL; May 7, 1982**

1. This is a referral of a grievance to the Ontario Labour Relations Board pursuant to section 124 of the *Labour Relations Act*. The grievance in question raises difficult problems concerning the interpretation of the collective agreement between the Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council.

2. The parties presented the Board with an Agreed Statement of Facts which reads as follows:

“The parties are agreed as to the following facts and are agreeable to such being placed before the Board for its consideration and the hearing into the above noted matter:

1. The proper name of the employer in this matter is Ontario Hydro, which is a member of The Electrical Power Systems Construction Association (known as “EPSCA”).
2. The applicant trade union, Local Union 2222 of the United Brotherhood of Carpenters and Joiners of America, as represented by the Ontario Allied Construction Trades Council and the employer, Ontario Hydro, as represented by the Electrical Power Systems Construction Association, are bound by the terms of a Master Collective Agreement entered into between the parties, which is dated February 13th, 1981 and was signed March 13, 1981. The parties are also bound by the terms of the “Foreman Appendix” appended to the aforementioned Master Collective Agreement dated December 12, 1980 and the “United Brotherhood of Carpenters and Joiners of America Appendix” which is incorporated by a letter of understanding dated July 31, 1980.
3. The parties are agreed that the proper employer is Ontario Hydro and that the applicant will request the Board to exercise its



discretion in permitting an amendment to the style of cause in this matter which will reflect such, and the employer will not object to such a request for an amendment on behalf of the applicant.

4. On Sunday, March 1, 1981 four (4) journeymen carpenters and one (1) carpenter foreman, all members of the applicant union in the employ of the "employer" worked pre-arranged overtime at the employer's Bruce Generating Station "A". The employees commenced work at 8:00 a.m. and worked until 1:00 p.m. when they were sent home. The employees worked through their normal lunch break and were paid accordingly for this period.
5. In respect of the above-noted work the carpenters in question were paid for five (5) hours work at the applicable overtime premium rate (double time) by the employer. The employees were also paid the applicable travel time allowance by the employer.
  - (a) There are no normally scheduled hours for carpenters on Sunday.
6. A grievance was initiated and filed with the employer dated March 6, 1981 by the applicant trade union on behalf of the employees in question with respect to an allegation by the union that the employer had breached the terms of the Collective Agreement in this matter.
7. The employer agrees that the grievance as filed was timely, and that the grievance procedure in force between the parties has been followed as required under the terms of the Collective Agreement in question.
8. The trade union agrees that the employer has followed the grievance procedure in question and has responded to each step of the grievance procedure to date in writing.
9. The grievance at this date remains outstanding between the parties and the parties at this time request the assistance of the Board in settling this matter."

By way of background it should be added that on the Friday before the Sunday in question, the foreman made up a team to work on the Sunday. The gist of the grievance filed by the union in this matter is that the employees in question should have been paid 16 hours pay rather than the 10 hours pay which they were actually paid.

3. Since the grievance before the Board involves matters of interpretation of the collective agreement, we will set out various articles which shall be referred to later. These are from the Master Portion of the collective agreement between the Ontario Allied Construction Trades Council and EPSCA:

“Article 17

*CALL-IN PAY*

- 17.1 When an employee is called in to work outside of his normal hours of work, he shall receive a minimum of four (4) hours' work at the appropriate premium rate plus travel allowance where applicable.

Article 18

*REPORTING PAY*

- 18.1 An employee who reports for work, unless directed not to report the previous day by his Employer, shall receive a minimum of four (4) hours' pay at the applicable rate when he reports for work but is given no opportunity to work because none is available. This allowance will be paid to an employee if he is requested to report for work for any part of the first half of the shift and an additional four (4) hours will also be paid if he is requested to report for work for any part of the second half of the same shift, together with travel allowance if applicable. It is not intended by this Article that an employee receive a reporting pay allowance greater than his pay for normal daily hours.

Article 28

*HOURS OF WORK*

- 28.1 The normal weekly hours of work for all employees of Employers covered by this Agreement shall be thirty-eight (38), except as described in sections 28.2, 28.3, 28.4 and 28.5.

The weekly hours shall be worked in four (4) eight (8) hour days, Monday to Thursday inclusive, with the remaining six (6) hours to be worked on Friday.

- 28.2 The hours of work for such work as driveway and parking lot construction, railroad construction, landscaping, tunnelling, precast concrete erection, fencing or demolition, shall be as established in applicable local agreements for the class and character of work.

An applicable local agreement shall be an agreement between a local of any union signatory to this Agreement and a builders' exchange, contractors' association or contractor applicable in the locality of the project for the class and character of the work.

- 28.3 The weekly hours of work for structural steel erection shall be

forty (40) hours made up of five (5) days of eight (8) hours each, Monday to Friday inclusive.

28.4 The weekly hours of work for site preparation and earth dams shall be 45 hours made up of five (5) days of nine (9) hours each, Monday to Friday inclusive.

28.5 The hours of work at all Lines and Stations Construction locations and Miscellaneous Projects (excluding Lakeview and R. L. Hearn Generating Stations), except those set forth in sections 28.2 and 28.4, shall be 40 hours per week made up of five (5) days of eight (8) hours each, Monday to Friday inclusive.

A Miscellaneous Project is any work undertaken by Ontario Hydro's Generation Projects Division which will require less than one year to complete and comprise a total project work force of not more than one hundred men at one time.

#### 28.6 PROJECT DAILY HOURS

##### (a) *Day Work Only*

The normal starting time for day work hours shall be 8:00 a.m. By mutual agreement between EPSCA and the Council, the starting time may be varied by one-half hour either way. This variance will be established at the prejob conference or while the job is in progress.

##### (b) *Shift Work*

- (i) Shift work may be established providing there are at least four consecutive days of shifts to be worked excluding Saturdays, Sundays and Statutory Holidays.
- (ii) The normal starting time for day shift hours shall be the same as the day work hours described in section 28.6(a).
- (iii) On Monday to Thursday inclusive, the second shift hours shall start at 4:30 p.m. or a variance of one-half hour either way to coincide with the end of the day shift. On Friday, the second shift hours may start at 4:30 p.m. or at the end of the day shift.

##### (c) *Hours of Work — Special Circumstances*

It may be necessary from time to time to vary the hours of work established in sections 28.6 (a) and (b). Any



amendments to the hours of work will be established by mutual agreement between EPSCA and the Council at the prejob conference or while the job is in progress.

- 28.7 The shift rate will be based on the day in which the shift begins.
- 28.8 The lunch period will be taken no more than four (4) hours after the start of the shift and will be one-half hour in duration."

From the appendix specifically relating to carpenters the following articles 2, 3, 4, and 6:

"Article 2

WAGES

2.1 GENERATION STATION PROJECTS

The rates of pay for employees in the classifications listed in Article 1 of this Appendix and working on Generation Station Projects shall be as set forth in the wage schedules attached hereto, subject to 2.3 below.

2.2 LINES AND STATIONS CONSTRUCTION ZONES AND MISCELLANEOUS PROJECTS

Wages rates for employees in the classifications listed in Article 1 of this Appendix and working in Lines and Stations Construction Zones and on Miscellaneous Projects shall be as set forth in the area rate schedules for each work location and area, subject to 2.3 below.

- 2.3 *REV* Effective May 1, 1974, and until April 30, 1982, EPSCA will amend the attached wage schedules and the area rate schedules for the classifications listed in Article 1 of this Appendix to conform to the hourly rates paid in the locality by the employers under agreement with the Union for construction work of a related nature.

- 2.4 In any locality where a rate for Resilient Floor Worker and Carpet Layer has not been established by agreement between employers and the Union for construction work of a related nature, the EPSCA Resilient Floor Worker and Carpet Layer rate shall be 90 per cent of the EPSCA Carpenter Journeyman rate in the locality.

- 2.5 EPSCA will provide the Council with current area rate schedules.

- 2.6 The rate for subforemen covered by this Appendix shall be the appropriate journeyman rate plus 50 cents per hour.

### Article 3

#### *SHIFT DIFFERENTIAL RATE*

- 3.1 Employees required to work shift work, other than the regular day shift, shall receive a shift differential of time and one-seventh for normal scheduled shift hours worked.

### Article 4

#### *OVERTIME RATES*

- 4.1 Overtime rates are paid for work performed outside of normal hours as defined in the "Hours of Work" article of the master portion of this Agreement and for work performed on Saturday, Sunday and the Statutory Holidays listed in the master portion of this Agreement. Overtime rates shall be calculated as a premium over the appropriate shift rate.

#### 4.2 GENERATION STATION PROJECTS

Overtime rates of pay for employees in the classifications listed in Article 1 of this Appendix and working on Generation Station Projects shall be as set forth in the overtime schedule attached hereto, subject to 5.4 below.

#### 4.3 LINES AND STATIONS CONSTRUCTION ZONES AND MISCELLANEOUS PROJECTS

Overtime rates for employees in the classifications listed in Article 1 of this Appendix and working in Lines and Stations Construction Zones and on Miscellaneous Projects shall be as set forth in the area rate schedules for each work location and area, subject to 5.4 below.

- 4.4 *REV* Effective May 1, 1974, and until April 30, 1982, EPSCA will amend the attached overtime schedules and the area rate schedules for the classifications listed in Article 1 of this Appendix to conform to the overtime rates paid in the locality by employers under agreement with the Union for construction work of a related nature, excluding Divers.

- 4.5 Overtime rates for divers as per the classification listed in Article 1 of this Appendix for all Lines and Construction Zones and Miscellaneous Projects shall be two times the appropriate shift rate paid for all hours worked outside of the normal hours in any one day, Monday to Friday, and for all hours worked on Saturday, Sunday and the Statutory Holidays listed in the master portion of this Agreement.

- 4.6 In any locality where the overtime rate for Resilient Floor Worker and Carpet Layer has not been established by agreement between employers and the Union for construction work of a related nature, the EPSCA Resilient Floor Worker and Carpet Layer overtime rate shall be the same as the EPSCA Carpenter Journeyman overtime rate in the locality.
- 4.7 EPSCA will provide the Council with current area rate schedules.
- 4.8 When overtime work is required, a minimum of one-half (1/2) hour's work will be provided.

#### Article 6

#### *INCLEMENT WEATHER PAY*

- 6.1 When an employee reports at the beginning of a shift but is unable to commence work because weather conditions are unsuitable, he shall receive two (2) hours' pay at the appropriate straight-time rate plus shift differential if on shift or the appropriate premium rate if on overtime, plus travel allowance where applicable. The employee shall remain at his place of work for two (2) hours unless he is permitted to leave by his Employer."

4. The argument of the applicant trade union in the present matter is that Article 18 of the Master Portion of the collective agreement applies to this situation. The proposed application of that article is that for the first four hours of the day, that is the first part of the Sunday shift, the applicable rate of double time was paid. However, once work in the second four hours of the shift commenced, then pursuant to that article, the employees were entitled to an additional four hours notwithstanding the fact that only one hour was worked, and further that the rate for those four hours should also be at double time.

5. The applicant relies heavily on an interpretation of Article 18 given by another panel of this Board in a previous decision which discussed that very article in the Master Agreement between the Allied Council and EPSCA. In that decision the Board stated:

"The more reasonable construction would appear to be that the article was to provide a guaranteed minimum of 4 hours' pay per half of the shift if the employee was requested to work for any part of the shift."

And indeed in that case the employees who worked for an hour and a half in the second part of the shift and then sent home were entitled to four hours pay. In the present case, the applicant argues that the phrase "applicable rate" in 18.01 is the overtime rate of double time and the clause should be applied in total to work on a Sunday.

6. The respondent argues that Article 18 does not apply to overtime work on a Sunday. He points out that the last sentence of Article 18 refers to normal daily hours and that given Article 28 of the Master Agreement there are no normal daily hours on a Sunday. Thus,



the clause only applies to normal working hours as set out in Article 28 which refers to work performed on Mondays through Fridays.

7. In support of this interpretation counsel for the respondent cites arbitral authority for the proposition that articles such as Article 18 are designed to compensate employees for the inconvenience of reporting for work and then being informed by the employer that no work is available, but such provisions are not interpreted as, in effect, punitive provisions. See for instance, *Re Page-Hersey Tubes, Limited* (1952) 1 L.A.C. 929 (Finkelman). In the circumstances of the present case, the employees having been paid at an overtime rate were paid a total of ten hours pay for the five hours which they actually worked.

8. We are of the view that Articles 17, 18 and 28 of the Master Portion of the agreement when read together do not support the applicant's interpretation in the present case. The reporting pay set out in section 18(1) deals with regularly scheduled daily work, and is limited to those circumstances. In the extraordinary situation of work on a Saturday or Sunday where overtime rates apply, the clause is not applicable because there are no normal daily hours on such days. To find otherwise would be to render Article 17 meaningless, and would fly in the face of the clear language of Article 28 in the Master Portion of the agreement, and Article 4 of the appendix relating to the carpenters.

9. For the foregoing reasons this grievance is therefore dismissed.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. The Agreed Statement of Facts as set out in paragraph 2 subparagraph 4 of the majority decision leads me to find in favour of the applicant for the grieving employees who were paid the applicable rate for actual time worked from 8:00 a.m. to 1:00 p.m. on the day in question — five hours.

2. Article 18 of the Collective Agreement covering reporting pay states:

“An employee who reports for work, unless directed not to report the previous day by his Employer, shall receive a minimum of four (4) hours' pay at the applicable rate when he reports for work but is given no opportunity to work because none is available. This allowance will be paid to an employee if he is requested to report for work for any part of the first half of the shift and an additional four (4) hours will also be paid if he is requested to report for work for any part of the second half of the same shift, together with travel allowance if applicable. It is not intended by this Article that an employee receive a reporting pay allowance greater than his pay for normal daily hours.”

Counsel for the respondent failed to admit Article 17, Call-In Pay, apply, the failure of such admission would leave me to apply Article 18.

3. The Reporting Pay Clause should apply under these circumstances, overtime was pre-arranged to be performed outside of regular hours. The employees worked for the first half of the shift and one hour into the second half of the shift and the employer should pay the employees for the four hours at the applicable rate for the second half of the shift as set out in Article 18, I would so rule.

**1043-81-U; 1044-81-U; 1718-81-R; 1719-81-R** United Cement, Lime & Gypsum Workers International Union, Complainant/Applicant, v. **Plastics CMP Limited**, Barry J. Lawrence Management Ltd., 440172 Ontario Limited, and 374686 Ontario Ltd., Respondents; United Cement, Lime & Gypsum Workers International Union, Applicant, v. **Plastics CMP Limited**, and 374686 Ontario Ltd., Respondents

Change in Working Conditions – Consent to Prosecute – Duty to Bargain in Good Faith – Remedies – Sale of a Business – Unfair Labour Practice – Employer refusing to bargain with certified trade union – Insisting on secret ballot to confirm employee support for union – Three quarters of unit work contracted out causing lay-offs – Duty to disclose at bargaining table – Decision to grant wage increase made after on set of freeze period – Violation of freeze provision – Re-instatement of displaced employees included in remedial order – Events having occurred six months ago consent to prosecute refused – Request for organization and legal cost premature – No sale of part of a business

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and B. L. Armstrong.

***APPEARANCES:** James Hayes and Frank MacLean for the applicant, Werner E. Kurz for the respondent Plastics CMP Limited, Barry J. Lawrence for the respondent Barry J. Lawrence Management Limited, Gerrit Craybeek for the respondent 440172 Ontario Limited and Herman Elgeti for the respondent 374686 Ontario Limited.*

**DECISION OF R. D. HOWE, VICE CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** May 27, 1981

1. File No. 1043-81-U is a complaint under section 89 of the *Labour Relations Act* in which the complainant trade union (hereinafter referred to as the "Union") complains that it and "all members of the bargaining unit" have been dealt with contrary to the provisions of sections 15, 64, 66, 70 and 79 of the Act by Plastics CMP Limited ("CMP"), Barry J. Lawrence Management Ltd. ("Lawrence"), 440172 Ontario Limited, which carries on business as Plastic Painters of Canada ("Plastic"), and 374686 Ontario Limited, which carries on business as Kawartha Moulding Consultants and Labour Supply Co. ("Kawartha"). File No. 1044-81-U is an application by the Union for consent to institute a prosecution of the respondents for those alleged breaches of the Act. File No. 1718-81-R is a section 63 application in which the Union contends that Kawartha is the successor of CMP by virtue of a sale of a business. File 1719-81-R is an application under section 1(4) in which the Union alleges that associated or related activities or businesses are or were carried on CMP and Kawartha.

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3. These matters were heard concurrently on the direction of the Board in view of the interrelatedness of a number of their factual and legal issues. The evidence adduced before the Board has been applied to each of the files in accordance with the agreement of the parties.

4. Although the respondent Lawrence was duly notified at these proceedings, no one appeared on behalf of that respondent during the four days (January 29, February 12, March 16, and March 17, 1982) on which the Board heard evidence with respect to these applications,

nor during the first day of argument (March 18, 1982). Although Barry J. Lawrence appeared before the Board on the final day of argument (April 14, 1982) and was afforded an opportunity to make submissions to the Board on behalf of the respondent Lawrence with respect to File Nos. 1043-81-U and 1044-81-U, he elected not to do so.

5. At the commencement of his argument on behalf of the Union, counsel stated that he was of the view that there was not sufficient evidence before the Board to support the Section 1(4) application and that, accordingly, his client would be "content to withdraw that matter". Since the Union's request for leave to withdraw its section 1(4) application was not opposed by either of the respondents thereto, that application is hereby withdrawn at the request of the applicant and with the consent of the Board.

6. CMP operates a high volume plating shop specializing in metal plating of plastic automotive components. The work performed at the plant includes moulding "pelletized" plastic into plastic parts, painting some of the parts with "resist" paint, "racking" the parts by mounting them on a rack which then moves through various chemical baths in a pre-plating process followed by an electroplating process, "unracking" the parts, "finishing" painting, inspecting the parts for quality control purposes, packaging and shipping. The plant was constructed and wired in the latter part of 1979 and early 1980. All of the extensive electrical work at the site was performed by Herman Elgeti, carrying on business as Elgeti Electric, a sole proprietorship. Mr. Elgeti, who is the President of Kawartha, also served as a CMP consultant who ordered equipment for installation at the plant.

7. Luba Veselinovic was the original incorporator of CMP in November of 1978 and has been a consultant to CMP since its inception. He reports directly to Gutav Blunk, the owner of CMP, and has responsibility for the financial and overall management of the company. Mr. Veselinovic decided to "contract" to Lawrence the provision, training and supervision of the unskilled workers needed to operate the plant, because Lawrence was experienced in that type of personnel management. Accordingly, CMP and Lawrence entered into a "Management-Consulting Agreement" in November of 1979 by which Lawrence agreed to manage and carry out the production line needs of CMP "including the provision, training and supervision of a sufficient number of the Consultant's personnel for the purpose of completing such work....". Pursuant to that agreement, Lawrence employees did "racking", "unracking" and painting of parts for CMP, as well as general maintenance work at the plant.

8. In the fall of 1979, the Union began to organize the employees who were working at the CMP plant. Eric Batten, a district representative for the Union, was provided with names of employees by his son-in-law, who worked at the plant while it was being built and subsequently worked in the plant as an employee of Lawrence. When Mr. Batten learned that an organization known as the "Lawment Trade Union" ("Lawment") had applied for certification as bargaining agent for the employees of Lawrence, he instructed counsel to intervene in those proceedings on behalf of the Union. In an unreported decision dated October 31, 1979, the Board, differently constituted, dismissed that application (File No. 1227-79-R) because it was not satisfied on the evidence before it that Lawment was a trade union within the meaning of the Act. The Board also found in that case that an "agreement" dated June 15, 1979 between Lawment and Lawrence could not "be construed as an agreement between an employer and a trade union". When Mr. Batten was subsequently informed by some of the Union members in the employ of Lawrence that Lawrence was deducting "union dues" from their pay cheques for remittance to Lawment, Mr. Batten caused a complaint to be



filed with the Board in December of 1979 under what is now section 89 of the Act in respect of those deductions (Board File No. 1674-79-U). On January 4, 1980, the Union and Lawrence entered a written settlement of that complaint by which Lawrence, without admission of liability, agreed to cease and desist from deducting monies from its employees on behalf of Lawment and to reimburse any employees from whom it had deducted such monies. Lawrence further agreed that it would not engage in support of Lawment or any other labour organization. Accordingly, the complaint was withdrawn at the request of the applicant and with leave of the Board.

9. Thereafter, an organization known as "The Association of Labourers, Painters, Platers and Plastic Workers" applied to the Board for certification as bargaining agent for the employees of Lawrence (File No 1893-79-R). Once again, Mr. Batten instructed counsel to intervene. After foreman James Herr, who was spokesman for the Association (and who was also one of the two persons who appeared before the Board on behalf of Lawment in support of its certification application), had been extensively cross-examined by counsel for the Union, the Association sought leave of the Board to withdraw its application for certification. However, in view of the stage which the proceedings had reached, the Board, differently constituted, dismissed that application in an unreported decision dated February 28, 1980.

10. Throughout that period, the Union's organizational activities continued until it finally came to be in a position to apply for certification on April 16, 1980. (Both Lawrence and CMP were named as respondents in that application.) By decision dated May 20, 1980 in File No. 0099-80-R, another panel of the Board certified the Union as bargaining agent for "all employees of Barry J. Lawrence Management Ltd. employed at Plastics CMP Limited in the Municipality of Peterborough, Ontario, save and except foreman [sic] and persons above the rank of foreman, sales and office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period."

11. Gerrit Craybeek, who is the current President of Plastics, has extensive experience in the development, manufacturing, marketing, technical and service aspects of painting and coating of automotive parts. He came to Canada from the United States in 1976 and subsequently established, with the assistance of his wife Susan, a number of corporations to protect various assets from seizure as a result of a lawsuit commenced against him by a former employer and as a result of his (Mr. Craybeek's) subsequent state of bankruptcy. He was employed at Lawrence as a consultant from November 11, 1979 to March 20, 1980 and was given the responsibility of solving "technical, administrative and production quality and flow problems" at the CMP plant. Although Mr. Craybeek recommended some "management-personnel alignment changes", he had no direct personnel supervision responsibilities during that period. During March of 1980 CMP's operations were shut down to implement some of the technical changes which Mr. Craybeek had recommended as a result of his consulting work. Included in Mr. Craybeek's recommendations to CMP (through Lawrence) was the suggestion that a new company be established to which CMP could "subcontract" the painting of the plated parts which it produced. It was Mr. Craybeek's evidence that he "suggested that the painting be subcontracted to a different company (i.e., a company other than Lawrence) in order to arrive at two very positive results: (1) a definition of responsibilities, personnel cost, etc.; and (2) by forming a separate corporation, the corporation would be free to investigate other marketing opportunities that existed in finishing". Mr. Craybeek also hoped to establish a sales position for himself with the new company. Pursuant to that suggestion, Barry J. Lawrence caused 440172 Ontario Limited (which, as noted above, is being referred to in this

decision as “Plastic”) to be incorporated. Mr. Lawrence also arranged for Plastic to rent 8,000 square feet of plant space and various paint equipment from CMP. At the same time, CMP and Plastic also entered into an agreement (dated April 9, 1980) whereby the latter would take over the painting of parts which had previously been performed for CMP by employees of Lawrence. The signatory of that agreement on behalf of Plastic was Barry J. Lawrence who, at that time, was a principal of both Lawrence and Plastic. After that documentation had been completed, Mr. Lawrence immediately transferred ownership of Plastic from himself to one R. G. McKenzie.

12. Mr. Veselinovic, whom the Board found to be an evasive witness with a “convenient” memory, did not provide any legitimate justification for CMP’s decision to shift the painting work from Lawrence to Plastic. He made no reference whatever to any decision on the part of the company to “define responsibilities, personnel costs, etc.” as suggested by Mr. Craybeek. Indeed, his evidence in this regard was: “I was dealing with one man, [Barry J.] Lawrence himself.... For me, it wasn’t any difference if it was Barry J. Lawrence Limited or Plastic Painters of Canada. So long as I got my parts painted, I really didn’t care if the name of the company changed or not.”

13. Having regard to all of the circumstances, including Lawrence’s support of Lawment, the managerial involvement in the Association of Labourers, Painters, Platers and Plastic Workers, the manner in which the shift of the painting work from Lawrence to Plastic coincided with the culmination of the Union’s organizational activities and application for certification in respect of Lawrence, and the failure of Barry J. Lawrence to testify in three proceedings, the Board infers that one of the purposes, if not the only purpose, of that arrangement was to ensure that the Union would not gain bargaining rights for the painters.

14. When Mr. Batten became aware during the late spring or early summer of 1980 that some of the painters at the CMP plant were uncertain whether they were employees of Lawrence or Plastic, as they would receive a paycheque from one company one time and from the other company another time, he raised the matter with Barry J. Lawrence who agreed to transfer all hourly employees of Plastic to the Lawrence payroll. That agreement, which was arrived at prior to signing a collective agreement, is reflected in the following letter to Mr. Batten (on Lawrence letterhead) dated August 19, 1980:

“This is to inform you that I have fulfilled my part of our agreement to employee [sic] all hourly employees of Plastic Painters of Canada.

All persons were transferred to the Lawrence Management Ltd. payroll on Tuesday, July 1, 1980.

Should you require any further information, please contact the writer.

Yours truly,  
(signed) Barry J. Lawrence”

Thus, through that letter, Mr. Batten was led to believe that the Union had bargaining rights for all of the painters working at the CMP site. In spite of that assurance, it appears from the evidence that unbeknownst to Mr. Batten, employees of Plastic continued to perform painting work at CMP plant alongside employees of Lawrence until October of 1980. Mr. Craybeek’s

explanation for this was that "some employees of [Lawrence] were used as a labour force by [Plastic] to handle any excess workload the employees of [Plastic] could not themselves do."

15. From June to September of 1980, Mr. Lawrence handled the entire administration of Plastic under the direction of Mr. McKenzie. Mr. Craybeek was the production manager and salesman for Plastic during that period. In the fall of that year Mr. Craybeek assumed responsibility for the administration of that company in addition to his other duties. It was also decided at that time that Mr. Lawrence should supply the major portion of Plastic's employees through his labour supply company (Lawrence). Thus, it was not until October of 1980 that Mr. Lawrence's undertaking to "transfer" to Lawrence the hourly employees of Plastic was fulfilled by terminating the painters employed by Plastic and "putting them into" Lawrence.

16. The negotiations which followed the Union's certification as bargaining agent for the employees of Lawrence culminated in a collective agreement dated June 30, 1980 between the Union and that company, which agreement was to be in force from July 1, 1980 to June 30, 1983. Mr. Batten testified that after the collective agreement came into effect, "labour relations with Lawrence were fairly normal". The Union had grievance meetings with Mr. Lawrence and also had "a couple of arbitrations". Mr. Craybeek sat in on "one or two" of the grievance meetings. In late November of 1980, Mr. Craybeek requested the Union to revise its collective agreement with Lawrence to eliminate overtime pay of time and one half on Saturdays and double time on Sundays so as to allow management a "more effective scheduling mechanism". It was Mr. Craybeek's evidence that not only the company but also the employees wanted that change to be made. That request was denied by the Union.

17. In the spring of 1981, Mr. Craybeek, who was finding it increasingly difficult to work with Mr. Lawrence, decided to leave the employ of Plastic. However, since it was apparent that Plastic could not function without Mr. Craybeek, Mr. McKenzie agreed to sell the company, which had debts in excess of \$50,000, to Mr. Craybeek for one dollar on the understanding that Mr. Craybeek would assume all existing liabilities, contracts and other obligations of the company. As a result of that sale which took place on June 19, 1981, Mr. Craybeek became the sole owner of Plastic.

18. Near the end of June in 1981, Mr. Craybeek terminated the arrangement under which Lawrence had supplied employees (painters) to Plastic. As a result, those employees were terminated by Lawrence and were immediately hired by Plastic with a slight increase in pay. Thus, the same individuals continued to perform the painting work at the CMP plant but under the employ of a different employer. When additional personnel were required by Plastic from time to time, they were generally provided by Ebb Management ("Ebb"), a company that had been established by Susan Craybeek with the assistance of her husband, to provide the services of employees subsidized by various (Federal and Provincial) government programs. Ebb also supplied personnel to a number of other Craybeek companies. Before determining whether the actions of Lawrence, Plastic and CMP in June of 1981 contravened the Act, the Board will examine and consider a number of contemporaneous events involving the respondents CMP, Lawrence and Kawartha.

19. At a point in time (in late 1980 or early 1981) which is unclear from the evidence, CMP terminated its labour supply contract with Lawrence. Mr. Veselinovic's evidence concerning the motivation for that decision was rather vague. It was his evidence that it has consistently been his view since the inception of CMP that unskilled work in the plant should be carried on



by an “outside employer” who would be in a position to train such employees. Nevertheless, he testified that he decided that CMP should terminate the contract with Lawrence and hire its own employees to “rack” and “unrack” parts because “management was complaining about the [Lawrence] rackers and unrackers . . . doing certain things” and that Barry J. Lawrence was not in a position to train them. Mr. Veselinovic was unable to recall who recommended that change to him.

20. When Mr. Batten became aware that Lawrence’s contract with CMP had been terminated and that Barry J. Lawrence was of the view that the collective agreement between the Union and Lawrence was “null and void”, Mr. Batten took steps to restore the Union’s bargaining rights by causing an application for certification to be filed with the board in late February of 1981 in respect to the production employees of CMP. By decision dated March 24, 1981, in File No. 2618-80-R, the Board, differently constituted, certified the Union as bargaining agent for “all employees of the respondent [CMP] in Peterborough, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, licensed electricians, and those covered by an existing collective agreement between [Lawrence] and [the Union]”. In its unreported decision in that matter, the Board wrote:

“4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on March 11, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. There was filed with the Board prior to the terminal date a statement of desire opposing the applicant’s certification bearing five signatures, one of which was for a person who was also claimed as a member of the applicant. If the Board were to accept this as evidence of the voluntary wishes of that employee, it would not affect the applicant’s right to be certified.

6. The group of objectors sought leave to file additional written evidence of support of employees wishing to oppose the applicant’s certification. No representations were made which were persuasive of the Board exercising its discretion to extend the terminal date herein for the purpose of receiving this additional evidence and accordingly, the Board refused to receive such evidence.”

21. Early in April of 1981, Mr. Batten gave CMP written notice of the Union’s desire to bargain with a view to making a collective agreement, pursuant to section 14 of the Act. He also provided management with a copy of the Union’s proposed collective agreement and advised the company that Debra Mullen and William Grant, who were employees of CMP, would be joining with him to form the Union’s bargaining committee. By letter dated April 14, 1981, Prabodh Bhakta, Vice-President of CMP, acknowledged receipt of the Union’s notice to bargain and stated:

“We are at this time studying your proposal in depth and will advise place and date for negotiations in the very near future.”

A month and a half later, Mr. Bhakta sent a second letter to Mr. Batten, with which he enclosed a copy of the following letter dated June 1, 1981, to the Board, and requested Mr. Batten's "cooperation with the Department of Labour in this matter until this situation is settled to everyone's satisfaction":

*"Re File Number 2618-80-R*

On March 30th, 1981, we received your certification of the United Cement, Lime and Gypsum Workers International Union as the bargaining agent for our employees. On April 8th, 1981, we received the proposed contract for the collective agreement from the Union. But, we the Company, find ourselves in a strange situation, our employees do not want us to negotiate and sign any contract with the Union. [sic]

We would like to request your help in this matter. As a suggestion, if you could come to our plant, acting in a non-partisan role and take a secret ballot. [sic] We would then go ahead and do as the majority rules. But at this time the Company is caught in the middle.

Your response to this request at your earliest convenience would be greatly appreciated."

Mr. Batten told the Board that when he received that letter, he "felt that they [the management of CMP] weren't serious" about bargaining and that "the only sensible step at that time was to apply for conciliation". A conciliation officer was appointed in due course and arranged for a meeting with the parties on July 10, 1981. Despite the fact that the Board, differently constituted, had dismissed on May 29, 1981 the request for reconsideration of the Board's decision (dated March 24, 1981 in File No. 21618-80-R) to certify the Union as bargaining agent for the employees of CMP, at the conciliation meeting Mr. Bhakta advised the conciliation officer and the Union's bargaining committee that CMP would not bargain until after a secret ballot vote had been held "to see if the Union represents the people" employed at CMP. Both Mr. Batten and the conciliation officer informed Mr. Bhakta to no avail that CMP was under a legal obligation to bargain in good faith with the Union and make every reasonable effort to make a collective agreement. A further meeting was held on July 21st but it lasted only five minutes because CMP continued its illegal refusal to bargain.

22. After that meeting, Mr. Batten instructed counsel to commence unfair labour practice proceedings. Accordingly, the section 89 complaint in File No. 1043-81-U and the related application for consent to prosecute (in File No. 1044-81-U) were filed with the Board on August 6, 1981 and were scheduled for hearing on August 31, 1981.

23. On August 31, 1981 the parties agreed to a *sine die* adjournment of the proceedings on the following terms:

"(a) The respondent Plastics CMP Limited agrees to meet with the complainant forthwith and to bargain in good faith as required by section 14 of the Labour Relations Act and as required by a Ministry of Labour Conciliation Officer or Mediator as the case may be.

(b) The complainant agrees to deliver to the respondent a letter setting out required information concerning the various incorporated and unincorporated business entities at the Peterborough site including their labour relations arrangements and policies.

(c) The respondents agree to respond forthwith in good faith and detail to bona fide enquiries made by the complainant as per paragraph (b) above.

(d) The complainant agrees that these matters will not be brought on for hearing before the OLRB unless the respondents have ten days notice before the day of hearing."

24. CMP gave each of the bargaining unit employees a wage increase in early July of 1981. Although Mr. Kurz testified that management made the decision "in November or December" of 1980 that a wage increase would be given in July of 1981 at the "beginning of the following model year", he conceded that the employees were not informed of the increase until July of 1981, although they were told "before Christmas in 1980 that there would be no consideration of any increase until July, that is, if there was going to be any increase it would be in June or July." He also testified that employees were told that management "would consider [a wage increase] in July, depending on how good the year looked." CMP did not seek the Union's consent to implement that wage increase.

25. By increasing the wages of the bargaining unit employees without the consent of the Union, CMP breached section 79(1) of the Act which provides:

"79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any rights, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first."



If CMP's decision to increase wages in June or July had been communicated to employees prior to the onset of the "freeze", then the "business as before" approach which the Board applies in cases involving section 79 would have obligated the employer to implement that increase. (See, for example, *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461; *Carleton University*, [1978] OLRB Rep. Feb. 184; *Hostess Food Products Ltd.*, [1975] OLRB Rep. Mar. 210; and *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049.) However, in the present case, employees had merely been told that "no consideration" would be given to a wage increase until June or July. Thus, no decision to increase wages was made by management or communicated to employees prior to the onset of the freeze; all that the employees had been told is that management would consider giving an increase at that time.

26. Pursuant to a two year "Labour and Consulting Agreement" dated November 1, 1980, Kawartha managed and supplied labour for CMP's "moulding department", and also supplied training and assistance to CMP's "maintenance department". Kawartha generally had a maximum of eight (non-managerial) employees working at the CMP plant under that contract. Two of those employees performed maintenance work on a regular basis. The other six operated the moulding machine which heated and moulded "pelletized" plastic into plastic parts; two of them operated that machine on each of the three daily eight hour shifts. It appears that the number of employees supplied by Kawartha had been reduced to five or six by the early summer of 1981 due to the elimination of one of the three shifts.

27. Werner Kurz, the present General Manager of CMP, told the Board that in July of 1981, he and Mr. Veselinovic "decided to allow Kawartha to take an expanded role at the site". On July 17, 1981, CMP and Kawartha entered into a "Tentative Agreement for Labour Supply and Consultant Services" whereby Kawartha agreed to supply "labour and consulting services" to CMP "for an amount of \$6.60 per person/per hour", which amount was to be subject to reassessment after six months. Mr. Elgeti testified that the discussions which led to the signing of that contract began in the second week of July. Mr. Elgeti conceded that he was aware that CMP was "bargaining" with the Union at that time, but maintained that he did not discuss the bargaining with Messrs. Veselinovic or Kurz because "it had no relationship to [him]". To effectuate that "tentative agreement", CMP "laid off 15 to 18" of its employees (i.e., all of its rackers and unrackers) on Friday, July 31, 1981. Most of the employees who were laid off by CMP sought employment with Kawartha and were hired by that company. Thus, they commenced work on the following Monday at the CMP plant as rackers and unrackers earning the same wages as they had earned as employees of CMP. CMP also "laid off" its Production Manager, Robert Kennedy, whose duties had included supervision of the rackers and unrackers, in addition to supervision of the plate line. Mr. Kennedy was also immediately hired by Kawartha to supervise its newly-hired rackers and unrackers. Thus, the implementation of that "Tentative Agreement" resulted in the same work (racking and unracking) being performed in the same place (the CMP plant) by substantially the same persons (the rackers and unrackers formally employed by CMP) under the direction supervision of the same individual (Mr. Kennedy). It also resulted in only about four bargaining unit employees remaining in the employ of CMP.

28. Mr. Kurz's explanation for the decision to contract out to Kawartha almost all of the bargaining unit work at the end of July was that CMP had added a third shift and had "problems... in the plating end of it" which caused management to be of the view that they should not have to "worry about the racking of material". It was his evidence that Mr. Elgeti "was in a better position time wise to look after these people or that function". He also stated that CMP was "experiencing some quality problems with the racking" and that the contracting

out “was done for a long term economic benefit”. When asked why CMP had not merely extended Mr. Elgeti’s “consulting functions” to include supervision of those employees instead of laying off them and their supervisor on the understanding that they would be employed by Kawartha at the CMP plant under the supervision of Mr. Elgeti, Mr. Kurz stated, “Because that’s the method we deemed best for us.” Under further cross-examination concerning that matter, he stated that he “really [couldn’t] say” why he and Mr. Veselinovic decided that contracting out was “the best way to go”. He also stated that he did not think that the Union had any bearing on the decision since it “never came up in the discussion”, although he admitted that he did not know what considerations were taken into account by Mr. Veselinovic who was the one who “ultimately made the decision”.

29. Mr. Veselinovic’s evidence concerning that decision was even less enlightening. He was unable to recall when the decision was made; when asked if it was made in the summer of 1981 he stated, “I don’t know.” He told the Board that he was consulted on that matter and agreed that contracting out “was the correct way to go”. However, he testified that the final decision was made by Mr. Kurz. (That evidence is, of course, in direct contradiction with the evidence of Mr. Kurz, who testified in the absence of Mr. Veselinovic.) Mr. Veselinovic also told the Board that the possibility of entering into a contract with Kawartha for the supply of rackers and unrackers was discussed with Mr. Elgeti “a couple or three times before July of 1981” and that one such discussion occurred in April. That evidence is in direct contradiction with the evidence of Mr. Elgeti (who testified in the absence of Mr. Veselinovic) that there were no such discussions until the second week of July. Having regard to his evasiveness, forgetfulness and general demeanour as a witness, the Board is unable to give credence to Mr. Veselinovic’s testimony that the work in question as contracted out to Kawartha because “the rejects rate was too high”, and that the contracting out to Kawartha “had nothing to do with collective bargaining”.

30. The hollowness of the business justifications put forward by the management of CMP in support of its decision to contract out the work in question to Kawartha is quite evident from the testimony of Mr. Kurz. Moreover, Mr. Elgeti conceded in cross-examination that Mr. Kennedy was essential to that “labour supply” agreement; since Mr. Elgeti was “the technical man” with “electrical expertise”, supervision of those employees continued to be the responsibility of Mr. Kennedy as it had been before the lay-off. Although Mr. Elgeti was subsequently able to use his technical expertise to “streamline the process” with a resulting reduction in manpower needs, it is not evident why such streamlining could not have been accomplished by Mr. Elgeti in his capacity as a consultant to CMP, without any necessity for “transferring” the workforce from the employment of CMP to the employment of Kawartha.

31. Mr. Elgeti was aware that the Union was the certified bargaining agent of the CMP employees who were laid off by that company on July 31, 1981. That one of the purposes, if not the only purpose, of the “labour supply” arrangements between CMP and Kawartha was to defeat the Union’s bargaining rights is evident from a “private” discussion which Mr. Elgeti had with Ms. Mullen, one of the laid off CMP employees whom he knew to be an active supporter of the Union, prior to agreeing to employ her. Mr. Elgeti testified:

“I explained to her that I had worked for eighteen years, that I had my own company, that I knew my responsibilities between the employees and myself, and that I would like to have a chance to run it by myself first because I knew she was a representative of the Union. I also told her that I

would make up an agreement between the employees and myself that if they were not satisfied with it, they could come by themselves or in a group to discuss it. If they were not satisfied and a majority of the people wanted to call the Union in to help them, that was all right to do, but I asked her to wait first and see what I could come up with to give me a chance to run it by myself. I never threatened her. I also asked her if she wanted to act as a representative between me and the employees on her shift and also asked her if she wanted to be the safety representative on her shift."

Despite that evidence, Mr. Elgeti subsequently told the Board, "It was not my intention to take the people away from the Union. I am not fighting the Union. We are fighting for survival, that's all." He also conceded in cross-examination that "they" had recommended that he not hire Ms. Mullen because she was a Union supporter, but that he had decided to give her a chance. Mr. Elgeti's evidence concerning who "they" were was far from satisfactory. Under vigorous cross-examination he ultimately conceded that it "could have been" a CMP supervisor. Later, in response to a question by Board Member Armstrong, Mr. Elgeti told the Board that Mr. Kennedy was one of the persons who was present during that discussion, along with "two or three other people". However, at a subsequent continuation of the hearing, he attempted to revise his earlier testimony by indicating that he had "remembered" that he received the advice in question during a conversation with one of his sons, who works with him in the moulding area and rides to and from work with him.

32. Having regard to all of the circumstances, the Board finds that one of the purposes, if not the only purpose, of the contracting out arrangements between CMP and Kawartha was to defeat the Union's bargaining rights. Thus, by entering into that arrangement and laying-off three-quarters of the employees in the bargaining unit, CMP breached section 64 and 66 of the *Labour Relations Act*. Furthermore, the Board finds that Kawartha, as an employer or a person acting on behalf of CMP, also contravened sections 64 and 66 of the Act by entering into those contracting out arrangements with full knowledge that one of the purposes, if not the only purpose, of those arrangements was to interfere with the representation of the employees in question by the Union and to compel them to cease to exercise their rights under the Act.

33. Mr. Kurz took over responsibility for bargaining with the Union in late July or early August of 1981. The only explanation offered for the substitution of Mr. Kurz in place of Mr. Bhakta as CMP's representative at the bargaining table was the following testimony of Mr. Kurz: "It was decided the Mr. Bhakta was not the man who should be coming to the hearing [of the Union's unfair labour practice complaint]. I was."

34. CMP never at any time raised at the bargaining table its decision to contract out approximately three-quarters of the bargaining unit work to Kawartha. It is clear from the Board's jurisprudence that a decision of that magnitude made while collective bargaining is ongoing must be raised by the employer for discussion at the bargaining table prior to implementation. The extent of an employer's obligation during bargaining to reveal decisions which significantly impact upon the employees in the bargaining unit or their bargaining agent has been addressed at length by the Board in a number of recent cases and need not be repeated in this decision. (See, for example, *Westinghouse Canada Limited*, [1980] OLRB Rep. April 57; application for judicial review dismissed, 80 CLLC ¶ 14, 062 (Div. Ct.); and *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261.) There is no doubt that the decision



taken by CMP in the instant case falls within the parameters outlined in that jurisprudence. The decision in question directly affected three-quarters of the work force. Thus, the present case involves an even more substantial decision than the decision by the respondent in *Sunnycrest (supra)* to contract out one-quarter of the bargaining unit work, which decision was held by the Board to be a matter that was required by section 15 to be raised by the respondent for discussion at the bargaining table. Although most of the CMP rackers and unrackers were offered employment by Kawartha, CMP's decision to eliminate three-quarters of the bargaining unit positions struck at the very root of the bargaining relationship — the bargaining unit itself. Thus, even if that decision had been wholly free of anti-union animus, the failure to raise and discuss it at the bargaining table would nevertheless constitute a serious contravention of section 15 of the Act.

35. After the employees in question had been “laid off” by CMP and hired by Kawartha, Mr. Batten contacted Mr. Kurz in an effort to arrange a bargaining meeting and stated that he wanted “to attend with the bargaining committee that he had before the [lay-off]”. Mr. Kurz responded that those people had been laid off by CMP and that he could not bargain on their behalf. Moreover, as he conceded in cross-examination, he was “not prepared to recognize the committee that had been named by the Union.” This refusal to meet and bargain with the bargaining committee appointed by the Union also constituted a breach of section 15. (See *Arnold-Nasco Limited*, [1978] OLRB Rep. July 587; *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309; *House of Braemore Upholstered Furniture*, [1967] OLRB Rep. Jan. 815; and *No-Snag Spring Co.* (1968), 68 CLLC ¶ 14,088 (Ont. County Court).)

36. Notwithstanding Mr. Kurz's illegal refusal to meet and bargain with the Union committee, Mr. Batten decided to go ahead with the bargaining meeting that had been arranged for September 22nd. At that meeting Mr. Kurz advised him that he (Mr. Kurz) would only negotiate about the small group of employees who remained in the employ of CMP, and not about the persons who had become employees of Kawartha. Mr. Batten suggested that they try to reach a collective agreement and bring the matter of the bargaining unit before the Board for determination. However, Mr. Kurz rejected that suggestion.

37. Thus, it is abundantly clear from the evidence that CMP has flagrantly and repeatedly violated section 15 of the Act. It failed to meet with the Union within fifteen days from the time when it received the Union's written notice of its desire to bargain with a view to making a collective agreement. It refused to recognize the Union's status as bargaining agent for its bargaining unit employees despite the fact that the Union had been certified by this Board in March of 1981. This refusal continued even after the Board declined to reconsider its decision to certify the Union as the bargaining agent of the employees of CMP without a representation vote. It failed to raise for discussion at the bargaining table its decision to contract out three-quarters of the bargaining unit work to Kawartha. In September it refused to meet and bargain with the members of the negotiating committee that had been selected by the Union.

38. The Board will now return to the issue of whether Lawrence, Plastic and CMP contravened the Act in June of 1981 when Plastic terminated its arrangement with Lawrence under which the latter had supplied employees to the former for the performance of painting work at the CMP plant, and immediately hired the dismissed employees to continue performing the painting work at the CMP plant. Although Mr. Craybeek was unwilling to

acknowledge that Plastic gained any material advantage by terminating its labour supply arrangement with Lawrence and hiring the former Lawrence employees directly, it is clear from the evidence that the new arrangement enabled Plastic to schedule production on Saturdays without always paying time and one half (as required by the collective agreement between Lawrence and the Union), and also enabled it to obtain subsidized employees through Ebb, which might not have been possible for Lawrence to do on behalf of Plastic in the view of the union security clause contained in that collective agreement. Moreover, from the perspective of CMP for which Plastic was performing the painting work, the removal of the painters from the Lawrence bargaining unit served to weaken the Union's presence in the plant during a period in which the Union was attempting to negotiate a collective agreement with CMP. Having regard to all of the evidence and the submissions of the parties, the Board is satisfied that it was not a mere coincidence that within a matter of weeks, CMP used a similar approach to remove three-quarters of its work force from the CMP bargaining unit by contracting the racking and unranking to Kawartha. The evidence indicates that Messrs Kurz, Veselinovic, Elgeti and Craybeek were all of the view that the Union's bargaining rights could be effectively reduced or eliminated by the simple expedient of arranging to have the unionized company lay off or terminate some or all of its unionized employees and contract the work previously performed by them to another company for which the Union had not been certified, which latter company would then hire those employees to perform the same work that they had previously performed. Moreover, in the circumstances of this case, we are satisfied that anti-union animus formed a part of the motivation, if not the sole motivation, for each of the many "transfers" of work and employees from company to company that were orchestrated by the respondents, with the exception of the "transfer" of employees from Plastic to Lawrence in October of 1980, which "transfer" was apparently carried out in order to fulfill Mr. Lawrence's earlier written undertaking to do so. In particular, the Board finds that Lawrence, Plastic and CMP contravened sections 64 and 66 of the Act in June of 1981 by their aforementioned activities.

39. Mr. Batten testified that the movement of employees from company to company by the respondents has caused frustration and discouragement among the union organizers and supporters. He told the Board that it has become difficult to talk to the employees because there "seems to be a fear" among them.

40. In considering the appropriate remedial response where an employer's contracting out of work has been found to constitute an unfair labour practice, the Board wrote as follows in *Sunnycrest Nursing Homes Limited, supra*:

"45. Section 89(4) of the *Labour Relations Act* gives the Board a broad authority to fashion an appropriate remedy for any breach of the substantive provisions of the Act. In this regard, the legislative imprint has been lightly laid. Because of the dynamic context of labour relations, and the variety of factual patterns which it was expected would [come] before the board, the Legislature has not attempted to enumerate fixed remedies for each of the substantive violations committed. Nevertheless, it seems obvious that the Legislature did not intend to engage in the empty gesture of creating rights without parallel remedies. The obvious implication of the language of section 89(4) is that the Board should attempt to fashion relief which is adapted to the situation which calls for redress. (For a general discussion of the Board's remedial authority see:

*Radio Shack* [1979] OLRB Rep. Dec. 1220; application for judicial review dismissed *sub nomine Tandy Electronics Ltd. v. United Steelworkers of America and Ontario Labour Relations Board*, 80 CLC paragraph 14 017, Ontario Divisional Court.)

46. It is axiomatic that remedial action, if it is to afford an effective redress for the commission of a statutory wrong, must be tailored to restore the person wronged to the position he would have occupied but for the action of the wrongdoer. Nothing less would effectuate the policies of the Act. In the case of employees who have been wrongly discharged, the Board typically orders that they be reinstated and made whole for any loss of pay or benefits suffered from the date of their termination until their reinstatement, and in addition, will usually require some affirmative action on the part of the employer — such as the posting of notices — in order to dispel the chilling effect on the exercise of statutory rights which the unfair labour practice may have caused. (See: *Valdi Inc.* [1980] OLRB Rep. Aug. 1254, *Fotomat Canada Limited* [1980] OLRB Rep. Oct. 1397, *Radio Shack*, *supra*, and *Westinghouse*, *supra*, for examples of remedial orders fashioned by the Board and in the case of *Radio Shack* and *Westinghouse* approved by the Courts.) It is recognized that to accomplish the reinstatement of illegally terminated employees, the employer may well have to terminate replacements who have been hired or rescind business arrangements which flowed from or followed the unfair labour practice. Only when such action is taken however, can it be really truly said that the wrong has been righted.

47. In our view, the situation is no different, and the need for a reinstatement remedy no less compelling, where an employer illegally subcontracts work performed by its employees and, in so doing, effects their termination. In both cases, the employees have been punished for exercising their statutory rights. The wrong is the same, and we can perceive no reason why the remedy should not be the same as well. In order to give effect to the reinstatement of his employees, the employer may be required to terminate his subcontract, but we do not believe such a requirement is unfairly imposed. But for the employer's breach of the Act, his employees would have remained in his employ."

41. Similar considerations have led the Board to conclude that the respondents in the instant case should be directed to restore the *status quo ante* that existed prior to the illegal "transfer" of painters from Lawrence to Plastic in June of 1981, and the illegal "transfer" of rackers and unrackers from CMP to Kawartha in late July of that year. (Although some of the earlier "transfers" of employees, such as the transfer of rackers and unrackers from Lawrence to CMP in late 1980 or early 1981, may also have been effected for the purpose of defeating the Union's bargaining rights, the Board is not disposed to attempt to restore the *status quo ante* with respect to those transfers due to the lengthy period of time which has elapsed since then, and because the Union elected to restore that loss of bargaining rights by applying for and obtaining certification as bargaining agent for employees of CMP, including those employees who had left the employ of Lawrence to become employees of CMP as a result of the cancellation by CMP of Lawrence's labour supply contract.) Moreover, CMP's failure to raise at the bargaining table its decision to contract out that work to Kawartha, in contravention of



section 15, reinforces our view that it is appropriate for the Board to direct that the *status quo ante* be restored. As observed by the Board in the *Sunnycrest* case (at paragraph 47):

“It would be an exercise in futility to attempt to remedy this kind of violation if the employer’s decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of its operations can be conducted where that decision has already been made and implemented. Nor would it make much sense to direct an employer to bargain with a union representing its employees over the termination of jobs which those employees no longer hold. The subsequent provision of a bargaining opportunity cannot cure the violation inherent in the elimination of unit work without notice or consultation. No meaningful negotiation could take place over a *fait accompli*, where the possible reinstatement of unlawfully terminated employees could be used by the employer as bargaining bait to induce acceptance of its terms. An order framed in this way would aggravate rather than cure the employer’s delinquent bargaining conduct. Since the loss of employment stemmed, (in part), from their employer’s unlawful action in bypassing their bargaining agent, we believe that a realistic bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to their termination.”

42. In the circumstances of this case, the Board is not dissuaded from granting plenary remedial relief to the applicant by the fact that a number of months have passed since the occurrence of the contraventions of the Act which form the subject matter of these proceedings. The Union quite properly attempted to avoid the need for litigation by making a *bona fide* effort to resolve matters through collective bargaining. After these proceedings had been commenced, the Union continued to seek a settlement which would be satisfactory to all of the parties. Scheduling difficulties, exacerbated by the relatively large number of parties, also delayed the adjudication of these matters to some extent. Moreover, the completion of the hearing in these matters on the merits, which commenced on January 29, 1982 and continued on February 12, March 16, 17 and 18, and April 14, was substantially delayed by the failure of CMP to properly marshal the oral and documentary evidence necessary for it to fulfill its statutory obligations under sections 1(5) and 63(13) to adduce at the hearing all facts within its knowledge material to the allegations that associated or related activities or businesses are or were carried on by CMP and Kawartha, and that Kawartha is the successor of CMP by virtue of a sale of a business. In an attempt to remedy that failure, the Board, on January 29, 1982, ordered CMP to produce “Mr. Luba Veselinovic or some other individual who has direct knowledge concerning the incorporation of the respondent Plastics CMP Limited and all other facts material to the section 63 and 1(4) applications, pertaining to the period from the incorporation of the company to July of 1981 when Mr. Kurz became the General Manager of the company.” CMP’s initial failure to comply with that order further delayed the hearing of these matters to the prejudice of the applicant and the persons whom it represents.

43. The Board, therefore, declares:

1. that the respondent Plastics CMP Limited has contravened sections 15, 64, 66 and 79 of the *Labour Relations Act*; and

2. that the respondents Barry J. Lawrence Management Ltd., 440172 Ontario Limited, and 374686 Ontario Limited have contravened sections 64 and 66 of the *Labour Relations Act*.

44. To remedy those contraventions of the Act, the Board orders:

1. that the respondent Plastics CMP Limited cease and desist from breaching sections 15, 64, 66 and 79 of the *Labour Relations Act*;
2. that the respondents Barry J. Lawrence Management Limited, 440172 Ontario Limited and 374686 Ontario Limited cease and desist from breaching sections 64 and 66 of the *Labour Relations Act*;
3. that the respondent Plastics CMP Limited forthwith reinstate in employment all the employees whom it laid-off, terminated or otherwise refused to continue to employ on July 31, 1981, and that the respondents Plastics CMP Limited fully compensate each of those employees for all lost wages and benefits sustained through those respondents' violations of the Act, together with interest calculated in the manner described in Practice Note 13, dated September 8, 1980;
4. that the respondent Plastics CMP Limited, on receipt of this decision, convene forthwith a series of bargaining meetings between itself and the complainant trade union, with the assistance of a Ministry of Labour mediator, at such times and for as long as the mediator deems necessary, and bargain in good faith and make every reasonable effort to make a collective agreement with the complainant;
5. that the respondent Plastics CMP Limited pay to all bargaining unit employees all monetary losses that the complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate heretofore a collective agreement due to the respondent's unlawful conduct, the said losses, if any, running up to the date of the first bargaining meeting convened in accordance with paragraph (4) of this order;
6. that the respondent Plastics CMP Limited forthwith provide the complainant with a list of names and addresses of employees in the bargaining unit, and keep that list updated on a monthly basis for one year or until it has entered into a collective agreement with the complainant, whichever shall first occur;
7. that the respondent Barry J. Lawrence Ltd. forthwith reinstate in employment all of the employees working as painters at the Plastics CMP Limited plant in June of 1981 whom it laid off, terminated or otherwise refused to continue to employ in June of 1981; that the respondents Barry J. Lawrence Management Ltd., Plastics CMP

Limited and 440172 Ontario Limited enter into such arrangements as may be necessary to enable the respondent Barry J. Lawrence to employ those persons as painters working at the Plastics CMP Limited plant; and that the respondents Barry J. Lawrence Management Ltd., Plastics CMP Limited and 440172 Ontario Limited fully compensate each of those employees for all lost wages and benefits sustained through those respondents' violations of the Act, together with interest calculated in the manner described in Practice Note 13, dated September 8, 1980;

8. that the respondent Plastics CMP Limited, at its own expense, mail a copy of the attached notice marked "Appendix" after being duly signed by an authorized representative of each of the respondents, to the residence of each person employed by it on the date of this decision and to the residence of each person employed by it on July 30, 1981, in Peterborough, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, licensed electricians, and those covered by an existing collective agreement between Barry J. Lawrence Management Ltd. and the complainant;
9. that the respondent Barry J. Lawrence Management Ltd., at its own expense, mail a copy of the attached notice marked "Appendix" after being duly signed by an authorized representative of each of the respondents, to the residence of each person employed by it on the date of this decision and to each person employed by it at any time during the month of June of 1981, at Plastics CMP Limited in the Municipality of Peterborough, Ontario, save and except foremen and persons above the rank of foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period; and
10. that the respondents post copies of the attached notice marked "Appendix" after being duly signed by an authorized representative of each of the respondents, in conspicuous places on their premises where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by each of the respondents to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access shall be given by the respondents to a representative of the complainant so that the complainant can satisfy itself that these posting requirements are being complied with.

45. Counsel for the Union requested that the Board order the respondents to compensate his client for all of the organizing, legal and other costs which have been "thrown away" as a result of the respondents' contraventions of the Act. However, the Board is not disposed to make such order at this point in time. Whether such costs will in fact have been "thrown away" is at least partially dependent upon whether the complainant succeeds in negotiating a collective agreement with CMP and restoring its bargaining rights for the



painters employed by Lawrence prior to July of 1981. The Board has made an extensive remedial order with a view to assisting the complainant in achieving those goals. Thus, we are of the view that counsel's request is premature. However, if the Board's order does not achieve the desired result, it may be appropriate for the complainant to apply to the Board under section 106 of the Act for reconsideration and variance of the Board's order.

46. As more than six months have elapsed since the occurrence of all of the events upon which the applicant relies in support of its application for consent to prosecute the respondents, the Board declines to grant such consent. As stated by the Board in *Weingarden & Hawrish*, [1975] OLRB Rep. Aug. 608, at paragraph 2:

"In considering the granting of consent to prosecute the Board is guided by the provisions of the *Summary Convictions Act* which provides that no proceedings can be instituted more than six months after the time when the subject matter of the proceedings arose. The Board will not give consent to the institution of a prosecution which would be abortive because of untimeliness under the above Act."

(See also *Sheffield Bronze Powder Company*, [1979] OLRB Rep. Nov. 1110; and *Freeman Electric Limited*, [1972] OLRB Rep. Sept. 822.) Although *The Summary Convictions Act* has been repealed, a six month limitation period continues to apply to such prosecutions by virtue of section 76(1) of the *Provincial Offences Act*, R.S.O. 1980, c.400, which provides:

"Proceedings shall not be commenced after the expiration of any limitation period prescribed for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed."

Therefore, the application for consent to prosecute is hereby dismissed.

47. Counsel for the Union also contended that there had been a sale of a business by CMP to Kawartha at the beginning of August of 1981. In support of his position he noted that the same employees were performing the same work under the same supervision in the same plant under the same conditions without any hiatus in production. Although CMP clearly did not sell to Kawartha all of its metal plating of plastic automotive components business, section 63 applies not only to the sale of the totality of an employer's business but also the sale of "a part or parts thereof" (see section 63(1)). In *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, the Board reviewed a number of its previous decisions concerning the meaning to be ascribed to the words "part of a business" and concluded (at paragraph 28):

"28. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization — managerial or employee skills, plant, equipment, 'know-how' or goodwill, — thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer

wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55 [now section 63], the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied."

48. In the present case, CMP did not transfer a coherent and severable part of its economic organization to Kawartha. There was no transfer of a distinct part of CMP's configuration of assets. The racking and unranking work which was contracted out to Kawartha is not severable from CMP's metal plating business. Moreover, even if the racking and unranking could be construed to be a part of CMP's business, the restoration of the *status quo ante* ordered by the Board in this decision will return that "part" to CMP, thereby transferring back to CMP any bargaining rights which might otherwise have attached to Kawartha. For the foregoing reasons, the Union's application under section 63 is hereby dismissed.

49. Accordingly, the section 1(4) application in File No. 1719-81-R is withdrawn at the request of the applicant and with the consent of the Board. The application for consent to institute a prosecution of the respondents (File No. 1044-81-U) is dismissed, as is the section 63 application (File No. 1718-81-R). The applicant's complaint under section 89 (File No. 1043-81-U) is granted and the Board remains seized of that matter in the event that a dispute arises concerning the implementation of the Board's order set forth above.

#### **DECISION OF BOARD MEMBER C. G. BOURNE;**

The decision of Board Member C. G. Bourne will issue at a later date.

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# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS BEFORE THE BOARD. THE BOARD FOUND THAT PLASTICS CMP LIMITED ("CMP") VIOLATED SECTIONS 15, 64, 66 AND 79 OF THE LABOUR RELATIONS ACT, AND THAT BARRY J. LAWRENCE MANAGEMENT LTD. ("LAWRENCE"), 440172 ONTARIO LIMITED ("PLASTIC PAINTERS") AND 374686 ONTARIO LIMITED ("KAWARTHA") VIOLATED SECTIONS 64 AND 66 OF THAT ACT, AND HAS ORDERED US TO INFORM THE AFFECTED EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES,

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,

TO ACT TOGETHER FOR COLLECTIVE BARGAINING,

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OUR RESPECTIVE EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS,

WE WILL CEASE AND DESIST FROM VIOLATING THE ACT,

CMP WILL REINSTATE FORTHWITH IN EMPLOYMENT ALL EMPLOYEES WHOM IT LAID OFF, TERMINATED OR OTHERWISE REFUSED TO CONTINUE TO EMPLOY ON JULY 31, 1981, AND THOSE EMPLOYEES WILL BE FULLY COMPENSATED BY CMP AND KAWARTHA FOR ALL LOST WAGES AND BENEFITS SUSTAINED THROUGH THOSE RESPONDENTS' VIOLATIONS OF THE ACT TOGETHER WITH INTEREST,

CMP WILL CONVENE FORTHWITH BARGAINING MEETINGS BETWEEN ITSELF AND THE UNITED CEMENT, LIME & GYPSUM WORKERS INTERNATIONAL UNION (THE "UNION") WITH THE ASSISTANCE OF A MINISTRY OF LABOUR MEDIATOR AND WILL BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT WITH THE UNION,

CMP WILL PAY TO ALL BARGAINING UNIT EMPLOYEES ALL MONETARY LOSSES, IF ANY, ARISING FROM THE LOSS OF OPPORTUNITY TO NEGOTIATE HERETOFORE A COLLECTIVE AGREEMENT DUE TO CMP'S UNLAWFUL CONDUCT,

CMP WILL FORTHWITH PROVIDE THE COMPLAINANT WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN THE BARGAINING UNIT, AND WILL KEEP THAT LIST UPDATED ON A MONTHLY BASIS,

LAWRENCE WILL FORTHWITH REINSTATE IN EMPLOYMENT ALL OF THE EMPLOYEES WORKING AS PAINTERS AT THE CMP PLANT IN JUNE OF 1981 WHOM IT LAID OFF, TERMINATED OR OTHERWISE REFUSED TO CONTINUE TO EMPLOY IN JUNE OF 1981, AND THOSE EMPLOYEES WILL BE FULLY COMPENSATED BY LAWRENCE, CMP AND PLASTIC PAINTERS FOR ALL LOST WAGES AND BENEFITS SUSTAINED THROUGH THOSE RESPONDENTS' VIOLATIONS OF THE ACT, TOGETHER WITH INTEREST.

PLASTICS CMP LIMITED

PER: \_\_\_\_\_

440172 ONTARIO LTD.

PER: \_\_\_\_\_

BARRY J. LAWRENCE MANAGEMENT LTD.

PER: \_\_\_\_\_

374686 ONTARIO LIMITED

PER: \_\_\_\_\_

This is an official notice of the Board and must not be removed or defaced.



**0190-82-JD** The Sarnia Building and Construction Trades Council on its own behalf and on behalf of its Members listed on Schedules "A" attached hereto, Complainant, v. **Polysar Limited** Acres Davy McKee Limited Energy and Chemical Workers Union and its Local 914, Respondent, v. The Association of the Millwrighting Contractors of Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, The Terrazzo Tile & Marble Guild of Ontario, Intervener #1, v. Ontario Pipe Trades Council, Intervener #2

**Jurisdictional Dispute – General contractor on project sub-contracting work – Sub-contractors employing members of complainant – Employer terminating contracts and using own employees to complete job – Employer's employees members of respondent union – No evidence work stoppages or threats thereof – No interim order under section 91(8) issuing**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

**APPEARANCES:** *L. C. Arnold and William Robb for the complainant; L. Bertuzzi, M. Addario and J. Fabian for the respondent Polysar; R. C. Fillion and L. Guest for the respondent Acres Davy McKee Limited; Daniel Ublansky and Stu Sullivan for the respondent Energy and Chemical Workers Union and its Local 914; G. Grossman for intervener #1; Philip Sanders for intervener #2.*

**DECISION OF VICE-CHAIRMAN D. E. FRANKS AND BOARD MEMBER W. H. WIGHTMAN; May 5, 1982**

1. This is a complaint concerning work assignment filed under section 91 of the *Labour Relations Act*. As part of the complaint, the complainant has requested that the Board issue an interim order as well as a cease and desist order, in effect restoring the performance of the work in dispute to the complainant trade unions. In accordance with the Board's Rules of Practice where an interim order is requested, the Board convened a meeting of the interested parties and heard their representations with respect to the request for an interim order. In the present case, after hearing the representations of the parties on the factual situation and with respect to the interpretation of section 91(8), the Board declined to issue an interim order.

2. The following fact situation was put before the Board at the consultation with the parties. The respondent, Polysar Limited, has two projects under way in Sarnia. One project, which is the subject matter of this complaint, is an Isobutylene Plant which was apparently started in January of 1981. Work on that job was performed by members of the complainant trade unions and it is common ground between the parties that as of April 23, 1982, ninety-five per cent of the work on that project has been completed, the remaining five per cent constituting about two months work. The other project being undertaken by the respondent Polysar is a Butyl Plant. This work had just recently commenced and it is apparently an extremely large project. However, it is not the subject of the present complaint.

3. The work on the Isobutylene Plant was being performed by Acres Davy McKee Limited as a general contractor who in turn sub-contracted various portions of the work, as agent for Polysar, to various trade contractors. It appears that on April 22, 1982, Polysar

cancelled its contract with Acres Davy McKee Limited which in turn led to the cancellation of the various sub-contracts (of which there are reported to be about 13 in all). Further, under the terms of the cancellation, instructions were given to have the site cleared of tradesmen and equipment by Friday, April 23, 1982. It also appears that at about the same time Polysar "suspended" all contracts and all work on the Butyl Plant referred to above which is across the street from the Isobutylene Plant.

4. At about the same time Polysar announced its intention, which it confirmed at the consultation in this matter, to complete the work on the Isobutylene Plant using its own employees, members of the Energy and Chemical Workers Union Local 914. Polysar's position on this was that there were some 750 of its employees currently on lay-off and that lay-off was due to end on May 10, 1981, and from that day on Polysar intended to complete the remaining five per cent of the work on the Isobutylene Plant using its own forces.

5. On Monday, April 26, 1982, members of the complainant Building Trades Council picketed the Polysar operations. This picketing continued Tuesday morning and on Wednesday morning, April 28th the date of the consultation held by the Board. Although the magnitude of the picket line is in dispute, there is no indication that Polysar's own employees were prevented from working, and of course, there was no work being performed on the Polysar Isobutylene Plant, which could be stopped by the pickets, although it is alleged that there are two unrelated contractors performing other work on the job site, and their employees were alleged to be late reporting to work on both Monday and Tuesday, the 26th and 27th of April, respectively. Although there were no specific representations resulting from this issue it is clear from representations to the Board that the Sarnia community views the acts by Polysar at both job sites as related, and there can be no doubt that this whole matter has caused considerable concern in the community.

6. Before dealing with the argument of the complainant and the response to that argument by the respondent Polysar, we should first note that counsel for Acres Davy McKee Limited took the position that it was not properly a respondent in the present case since at the time of filing the complaint it no longer had any connection with the job site in question, its contract having been completely cancelled by Polysar. We note this at this point, noting however, that the Board declined to rule on this issue leaving it to be dealt with more specifically at a hearing by the Board in this matter.

7. Counsel for the complainant argued that the present complaint under section 91 was the same as the *Ford case* (an unreported decision of the Board involving a work assignment dispute between the Windsor Building Trades Council and the Ford Motor Company of Canada Limited and The United Automobile Workers of America). He thus argued that Polysar's announced intention to assign the work to the Energy and Chemical Workers Union should be stopped by an interim order, and the work should be assigned to the members of the Building Trades Council which had previously performed the work. He argued that a strike was imminent by virtue of the picket line referred to above and that the high emotions generated in the community over the conduct of the respondent Polysar could very well lead to further industrial conflict.

8. Counsel for the respondent Polysar challenged the Board's jurisdiction to entertain the complaint under section 91(1) generally. Counsel, however, also specifically addressed the matter of the requirement of section 91(8) dealing with the issuance of an interim order. He

pointed out that the strike, if any, was not “by reason of any assignment of work” and further he pointed out that there was no strike because there were no employees to go on strike. In that sense, therefore, there could be no justification for issuing the interim order since none of the Building Trades employees had left the place of employment since given the situation they were simply no longer employed there.

9. Counsel for the respondent trade union took no position with respect to the issuance of the interim order. Counsel pointed out that to date no assignment had been made to the members of the respondent union, however, they would perform work pursuant to their collective agreement if it was assigned to them.

10. After consideration of the positions of the parties, the Board declined to issue an interim order under section 91(8). That subsection reads as follows:

“Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers’ organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.”

We are of the view that that section contemplates an existing or threatened work stoppage with respect to the named respondents by reason of the assignment on which the complaint is based. In the present case the mere presence of a picket line is not in itself a strike affecting the respondents. Indeed, since there are no Building Trades employees on the job site, it is doubtful that the building trades employees can conduct a strike in such circumstances. Nor is there any evidence that such a picket line would stop the employees who are members of the respondent Energy and Chemical Workers Union from performing their duties of the respondent Polysar.

11. This is apart from the very real problem that this case raises with respect to the complainant asking for an order against the members of its constituent locals. Presumably, any cease and desist order which would arise from an interim order would be to direct the members of the unions belonging to the complainant Building Trades Council from picketing. In effect then, the complainant is asking for an order directed principally at itself to stop members of its constituents from picketing.

12. In this respect the present case is quite different from the *Ford case* referred to by counsel for the complainant. Although the situation in that case was similar in that the plant being constructed was almost finished when work that had been assigned to the Building Trades was reassigned to members of the U.A.W., which is the case with respect to the Isobutylene Plant construction. In the present case there are significant differences. The Board, in the *Ford case*, did in fact direct the reassignment of work to members of the Trades Council, but in that case, when the request for an interim order was made, there had been a history of work stoppages on the plant site as a result of pickets by certain members of the Building Trades Council unions. There were both U.A.W. members and Building Trades Council members at work on the job site and these picket lines effectively stopped work by the Building Trades Council employees. Further, the complainant Windsor Building Trades



Council was able to show that these picket lines were quite outside of their control. In the present case, there is not a mixture of Building Trades Council tradesmen and Energy and Chemical Workers Union members on the job site. Indeed, there is no one on the job site. Nor has there been a history of work stoppages on this job site. In the absence of such work stoppages or threats thereof, it is clear that the Board does not have the power to issue an interim order under subsection 8.

13. In giving its oral ruling at the end of the consultation in this matter, the Board noted that the complaint under section 91(1) would be processed in the usual manner, and the Board directed counsel for any respondents challenging the jurisdiction of the Board to entertain the complaint under subsection 1, to have their representations on this matter filed with the Board by Wednesday, May 5, 1982. The Board also noted, that should work stoppages occur in the future, the complainant could at that time renew its request under subsection 8.

14. The matter is referred to the Registrar for further processing of the section 91 complaint.

#### **DECISION OF BOARD MEMBER C.A. BALLENTINE;**

1. I dissent from the majority opinion. I would have issued an interim order restoring the original assignment of the work in dispute to members of the complainant Building Trades locals.

*(Appendix "A" omitted)*

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#### **2367-81-M William Wesley Moreland, Applicant, v. United Rubber, Cork, Linoleum and Plastic Workers of America, Respondent, v. Precision Rubber Products (Canada) Limited, Respondent**

**Religious Exemption – Applicant's objection based on literal reading of bible – Test of sincerity – "Religious" given broad meaning – Exemption granted**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. A. Ronson and O. Hodges.

**APPEARANCES:** *William Wesley Moreland for the applicant; D. Marshall and V. Cosic for the respondent trade union; No one appeared for the respondent employer.*

#### **DECISION OF VICE-CHAIRMAN D. E. FRANKS AND BOARD MEMBER J. A. RONSON; May 31, 1982**

1. The applicant, Mr. William Wesley Moreland, has requested the Board, pursuant to section 47(1)(b) of the *Labour Relations Act* to exempt him from the obligation to pay union dues because of his religious objection to the union.

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3. The present application is timely having regard to section 47(2). The collective agreement in force between the parties is the first collective agreement which contains a clause requiring the payment of dues to a trade union and Mr. Moreland was in the employ of the employer at the time that collective agreement was entered into.

4. To qualify for the exemption under section 47 the applicant must satisfy the Board that the objection to paying union dues is based on religious conviction or belief rather than any desire to avoid paying money to the trade union. In making its determination, the Board applies a subjective test of sincerity and takes a broad view of the term "religious". Although Mr. Moreland does not belong to one of the established churches, he belongs to a group which believes in the literal interpretation of the scriptures. From this literal reading of the Bible, he has concluded that it is contrary to the Bible to engage in the activities of a trade union, in particular a strike.

5. The Board found Mr. Moreland to be a straight-forward and credible witness and we are satisfied that his beliefs are sincerely held and that it is these beliefs which are at the root of his objection to the trade union. It is also clear that this objection is the result of beliefs which may properly be called religious beliefs.

6. Accordingly, we order that:

- (a) Article 5.-4 and 5.05 of the collective agreement between Precision Rubber Products (Canada) Ltd. and Local Union #822, United Rubber, Cork, Linoleum and Plastic Workers of America entered into on the 2nd of February, 1982 does not apply to Mr. William Wesley Moreland, and that,
- (b) Mr. William Wesley Moreland is not required to pay any dues to the union provided that amounts equal to any dues or other assessments are paid by the applicant, Mr. Moreland, to a charitable organization mutually agreed upon by the applicant and the respondent trade union. However, if the applicant and the respondent trade union fail to so agree then the parties should inform the Board in writing forthwith, including such representations, if any, that each may care to make as to the charitable organization to be designated and the Board will then designate a charitable organization pursuant to section 47(1) of the *Labour Relations Act*.

#### **DECISION OF BOARD MEMBER OLIVER HODGES;**

1. I dissent.

2. The Board's practice in section 47 applications was set out in the *Hellen Wybenga* case, [1976] OLRB Rep. Aug. 422. This case held that three questions had to be asked:

- 1. Are the beliefs sincerely held?
- 2. Are the beliefs religious?
- 3. Are the beliefs the cause of the objection to paying dues to the trade union?

3. It is incumbent on the Board to closely scrutinize the nature of the “religious” beliefs. A “religious belief” need not be based on the tenets of any particular organized religion, but it “must be based [on] the *personal conviction or belief* of the applicant and accordingly is a subjective matter.” (*Hodetorp* [1972] OLRB Rep. Feb. 132 at para. (1).) See also *York University Re Helen Freedhoff* [1982] OLRB Rep. Jan 135 wherein it is stated at 143 that “an applicant need not be a member of a religious sect which espouses as part of its dogma or doctrine opposition to unions”.

4. However, the “personal conviction” must be genuinely religious. Here we embark on the troubled waters of definition of the word “religious”. In *Adelaide Company of Jehovah’s Witness Inc. v. The Commonwealth* (1943) 67 CLR 122 at 123, 124 the following comment was made:

“It is true that in determining what is religion and what is not religion, the current application of the word “religion” must be taken into account.”

Based on this proposition, the Board in *York University, Re Douglas N. Butler*, [1981] OLRB Rep. Sept. 1319 defined religious beliefs (at para. 17) as those beliefs which:

“...relate to the Divine (in some form) and man’s perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*.”

5. I take *Butler* to mean that beliefs which are somehow diffusely connected with religion do not meet the section 47 test. Such beliefs include, for example, a belief that the “Christian way of life” somehow excludes membership in a trade union. On the other hand, if an applicant believes that trade unions are subject to Divine proscription, such a belief may well satisfy section 47.

The “general overall thrust” of the objection may not have been religious in nature for the Board to have granted applicants relief in the past. (See *Freedhoff*, *supra* at p. 146.) In cases of dual motivation, the religious objection need not be the sole cause for seeking the exemption although the Board in *Freedhoff* has now properly moved towards a “primary cause” doctrine with its “general thrust” wording.

7. In the end the present case highlights the difficulties in applying section 47. One can only agree with the U.S. 2nd Circuit Court in *Buckley v. American Federation of Television and Radio Artists* 496 F. 2nd 305 at 311:

“[A]ssuming *arguendo* that government action is involved here, the dues... constitute the employees’ share of the expenses of operating a valid labor regulatory system which serves a substantial public purpose. If there is any burden on [the employee’s] free speech it would appear no more objectionable than a “non-discriminatory [form] of general taxation”.”

8. Considering all of the evidence and in the circumstances of this case, I am not satisfied that the applicant qualifies for exemption from the provisions of the collective agreement which require the payment of dues to the trade union.



9. The applicant testified that “up to three years ago, on October 11, I was an unbeliever. I had thought unions very positive”. Asked whether he objected to all unions, he answered “some”. He testified that he could participate in some union activities. He agreed that unions were formed by the will of God to bring some type of pressure against certain employers. He said one of the union actions he agreed with was the grievance procedure. He views some union wage demands as extreme, however.

10. “Religious conviction or belief” within the meaning of the Act must in my opinion be shown to be other than a difference of opinion as to how other persons conduct themselves in pursuit of their (and his) secular needs. The applicant does not want his dues to go to support the legitimate activities of the trade union, although he agrees with some basic union functions. I would have thought the applicant’s conversion to the religious life would have required him to become an activist within the trade union, rather than an adversary. However, the Act requires one to be satisfied that the applicant has proven his reason for seeking exemption under section 47 is “religion conviction or belief”. This he has failed to do, and I therefore find that his application be dismissed.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I am in complete agreement with the decision of the Vice-Chairman, D. E. Franks. However, I have had the opportunity to read the dissent of Board Member, O. Hodges and feel compelled to make two comments.

- (1) Mr. Moreland is the epitome of that class of persons which section 47(1)(b) of the *Labour Relations Act* is designed to protect; and
  - (2) if the test or approach to section 47(1)(b) is as enunciated by the dissent of Board Member, O. Hodges then section 47 would protect no one. The objects of this Board do not encompass the attempted emasculation of a section of its governing legislation.
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**0223-82-R The Canadian Union of Educational Workers, Applicant, v. Queen's University at Kingston, Respondent, v. Group of Employees, Objectors**

**Build Up – Certification – Pre-Hearing Vote – Application seeking bargaining rights for graduate students of university – Significant turn over of students in April – New students not employed in bargaining unit until September – Fraction of actual unit eligible to vote if vote held in summer – Board postponing pre-hearing vote until October**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members W. G. Donnelly and O. Hodges.

**APPEARANCES:** *Elizabeth J. Shilton Lennon, Michael O'Keefe and Bev. Chaykowski for the applicant; Robert A. Little, Maurice Yeates, M. W. Wright, Douglas Heath, and Allan Headrick for the respondent; Pieter Geekens for the objectors.*

**DECISION OF THE BOARD;** May 31, 1982

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

2. This is the fourth pre-hearing vote certification application which the Canadian Union of Educational Workers (the "Union") has filed with the Board in the past fifteen months in its efforts to obtain bargaining rights for various students at the respondent University who are employed by the respondent as research assistants or as employees who engage in teaching, tutoring, marking, demonstrating, lecturing or instructing. On March 24, 1981, the Union applied for certification as bargaining agent for "all employees of the respondent engaged in teaching, tutoring, marking, demonstrating, lecturing or instructing who are enrolled as students at Queen's University (and are paid out of operation funds)." In a decision dated April 7, 1981 in that matter (File No. 2790-80-R), the Board, differently constituted, directed that a pre-hearing representation vote be taken of all employees in the voting constituency on the 1st day of April, 1981, who had not voluntarily terminated their employment or who had not been discharged for cause between the 1st day of April, 1981, and the date of the vote. By letter dated April 10, 1981, counsel for the Union requested leave of the Board to withdraw that application. However, in accordance with its normal practice as set forth in paragraph 6 of Practice Note No. 7, the Board (in a decision dated April 15, 1981) dismissed the application and drew the attention of the parties to the decision of the Board in *Mathias Ouellette* (1955), 55 CLLC ¶ 16,026.

3. On April 27, 1981 the Union filed a second pre-hearing vote certification application (File No. 0199-81-R). That application, like the present application, was confined to employees of the respondent "engaged in teaching, tutoring, marking... *who are enrolled as graduate students* in the School of Graduate Studies and Research at Queen's University at Kingston and paid out of operating funds" (emphasis added). In view of its previous decision, "the Board [deemed] it advisable to hear the representations of the parties as to whether it should entertain [that second] application" (see paragraph 2 of the Board's decision dated April 29, 1981 in File No. 0199-81-R). At the hearing scheduled for that purpose, the parties filed the following "Minutes of Settlement" with the Board:

"The parties hereto hereby agree to the settlement of the within application for certification on the following basis:

1. The applicant undertakes not to make a new application for certification covering any of the employees sought in the within application or the earlier application (Board File No. 2790-80-R) before September 20, 1981.
2. The respondent agrees that if the applicant makes a new application for certification after September 20, with respect to any of the employees referred to in paragraph 1 hereof, there shall be no bar to that application flowing from either of the application for certification referred to in the said paragraph.
3. The applicant agrees to seek leave to withdraw this application."

In a decision dated May 19, 1981, that application was dismissed by the Board.

4. On April 6, 1982, the Union filed a further pre-hearing vote certification application in which it sought bargaining rights for a unit of employees identical to that requested in its initial application (i.e., a unit including both graduate students and undergraduate students). In support of that application the Union filed membership evidence consisting of 302 combination application for membership and receipts. The list of employees filed by the respondent in that matter, as amended at the pre-hearing vote meeting, contained a total of 887 names, of which the applicant challenged 262. After the pre-hearing vote meeting had been held but before the Board had issued any decision as a result thereof, the Union sought leave to withdraw that application. The reason for that request, as set forth in letter dated April 26, 1982 from Paul Pellettier, a Staff Representative of the union, was as follows:

"The Union wishes to withdraw the above-noted application. As indicated in a letter from our counsel, Elizabeth J. Shilton Lennon, dated and delivered to the Board April 22, 1982, we have been investigating the circumstances surrounding the names on the Employer's list of employees which we challenged at the meeting with the Labour Relations Officer in Kingston. We have come to the conclusion that we will not be able to be successful in a sufficient number of our challenges in order to entitle us to a pre-hearing vote on this application in the end. This is the reason for our withdrawal of the application."

In a decision dated April 27, 1982, another panel of the Board chaired by the present Vice-Chairman dismissed that application in view of the stage in the proceedings at which the request for withdrawal was made.

5. The present application was filed on April 28, 1982. The Union seeks certifications, through a pre-hearing representation vote, for "all employees of the respondent engaged in teaching, tutoring, marking, demonstrating, lecturing, or who are employed as research assistants, who are enrolled as graduate students in the School of Graduate Studies and Research at Queen's University at Kingston, and who are paid out of operating funds; saye and except those covered by existing collective agreements or who are regular faculty." Thus, like the second application filed in the spring of 1981, the instant application is confined to graduate students. In accordance with the Union's request, 264 of the combination applications and receipts filed by the Union in support of its April 6, 1982 application have been transferred to this application.



6. A hearing was scheduled by the Board on May 12, 1982 for the purpose of calling upon the applicant to show cause why the Board ought to direct that a pre-hearing representation vote be taken in the circumstances of this case. The facts agreed upon at the hearing, together with the additional evidence adduced by the parties, indicate that, on the date of the application, there were 603 employees in the bargaining unit proposed by the applicant. In addition, there were 110 other employees whom the respondent contends ought to be included in the appropriate bargaining unit, which the respondent submits should include not only graduate students in the School of Graduate Studies and Research, but also under-graduate students (106 of those 110 employees) and students enrolled in the graduate program in the School of Business (the remaining four employees). As of the terminal date fixed for this application, May 10, 1982, there were only 113 employees in the bargaining unit proposed by the applicant (and only 8 other employees whom the respondent contends ought to be included in the bargaining unit). The reason for this very substantial reduction in the size of the bargaining unit is that most of the employees' (written) contracts of employment with the respondent had a termination date of April 30, 1982.

7. While many of the graduate students in the humanities and social sciences remain in Kingston during the summer to continue their research, course work and other scholastic endeavours, it appears that some of the other graduate students leave the Kingston area during the summer to conduct research in other locations. Relatively few of the graduate students who plan to remain in the Kingston area during the summer will be employed in the bargaining unit during that period. Moreover, the 113 graduate students employed during the summer will not be representative of the graduate students employed during the regular academic year; 79 of those 113 summer employees are in the Department of Economics and approximately 15 of them are in the Department of Psychology. Thus, graduate students from those two departments would have a slightly disproportionate influence on the outcome of the application if the Board were to conduct a vote during the summer in accordance with its general practice concerning eligibility to vote in a pre-hearing representation vote, which enfranchises all the employees in the voting constituency on the terminal date who have not voluntarily terminated their employment or who have not been discharged for cause between the terminal date and the date the vote is taken.

8. Counsel for the applicant urged the Board to depart from that general practice and direct that all persons employed in the bargaining unit on the date of the application be permitted to vote. However, the Board is not prepared to accede to that request. As noted by the Board in *London District Children's Treatment Centre*, [1980] OLRB Rep. April 461:

"17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decision, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co Ltd.*, (1946), 46 CLLC ¶ 16,461) it evolved the two-pronged eligibility rule to give clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316."

In *J. McLeod & Sons Ltd.*, *supra*, the Board considered and rejected the contention that it has no authority under the Act to determine voter eligibility dates other than the date on which the application was made.

9. Although the Board's approach to determining eligibility to vote is not entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from it in a particular case. It might be appropriate in some circumstances to use the application date, rather than the terminal date, as the first prong in determining voter eligibility. However, that departure from the Board's normal practice would not, by itself, assist the applicant since the termination of the employment of over eighty per cent of the persons in the proposed unit two days after the application date would nevertheless preclude all of those persons from voting unless the Board also abandoned the second prong of its normal voter eligibility direction, which, as a matter of labour relations policy, we are not prepared to do in the circumstances of this case. As noted by the Board in *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805, at paragraph 8, "[p]art of the reason for the two-pronged rule is to ensure, insofar as possible, that the vote will reflect the true wishes of the employees with the most direct interest in its outcome, namely, the employees who are in the bargaining unit at the time the vote is taken. . . . Persons who have become strangers to the bargaining unit by the time the vote is taken do not have a right to vote, notwithstanding that they may have been in the bargaining unit on the date that the application for certification was filed." If the summer period were merely a temporary hiatus in the employment of most of the persons employed on the date of the application, it might be appropriate to conduct a representation vote during the summer and to permit them to cast ballots in such vote despite their lack of employment status at the time of the vote. However, the high degree of turnover in the unit from year to year gives rise to a substantial doubt that many of those persons would have a direct interest in the outcome of the vote as a significant number of them have little prospect of re-employment with the respondent during the 1982-83 academic year. Thus, the major departure from the Board's normal practice which the applicant seeks would very likely result in many persons being eligible to vote who would have no personal stake in the outcome of this application.

10. This is not the first case in which the Board has been called upon to deal with an application concerning trade union representation rights in the context of an employer with a work force that is subject to regular cyclical fluctuations. In cases involving seasonal industries such as the canning industry and the tobacco industry, the Board has developed the practice of including seasonal or temporary employees in the bargaining unit if the application for certification is made during the season, and excluding such employees if the application is made in the off-season. (See, for example, *Melnor Manufacturing Limited*, [1969] OLRB Rep. March 1288. The Canada Labour Relations Board applied a similar approach in *Canadian Brotherhood of Railway, Transport and General Workers and Canadian National Railway* (1970), 70 CLLC ¶ 16,019, in which the applicant sought certification in respect of a unit of employees at Jasper Park Lodge. At the time of the application in March of 1970, the Lodge employed only about 50 employees, but during the summer season that number would increase to approximately 450 employees. The C.L.R.B. declined to defer or reject the application on that basis but excluded from the bargaining unit "the relatively large group of temporary employees consisting of students hired on a temporary basis for employment in the Lodge operation, for the summer period.") This approach seeks to assure that the collective bargaining desires of the persons employed during the season. Although it has been the Board's experience that this approach has worked well in the context in which it arose (i.e., the tobacco and canning industry), the Board has been reluctant to extend it to "seasonal" employees in other industries (other than students employed during the school vacation period, whom it will generally exclude from a "full-time" unit at the request of either party,

where the employer has a history of employing such students: see *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. March 324). For example, in *Indusmin Limited*, [1981] OLRB Rep. Dec. 1790, the Board noted that it has been “specifically freed” of seasonal considerations in the construction industry by section 119(2) of the Act, and declined to characterize as seasonal the respondent’s aggregate hauling activities which were functionally related to the construction industry. See also *Filkon Food Services Limited*, [1981] OLRB Rep. Dec. 1771 (application for reconsideration dismissed, [1981] OLRB Dec. 1772) in which the Board wrote (in paragraph 4):

“...the Board has consistently refused to take into account seasonal fluctuations in a work force from the point of view of either ‘build-up’ or bargaining unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546, and *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215.) The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force.”

In the *Filkon* case, the employment level at the time of the application was representative of the employee complement in the bargaining unit for ten months of every year. Only during the remaining period of two months was the employee complement to increase by sixteen students (for a total of twenty-two bargaining unit employees). The Board was not of the view that the desire of that “permanent” complement of part-time employees for collective bargaining ought to be deferred to await the wishes of additional students employed only during the school vacation period. Accordingly, the Board declined to exercise its discretion to defer further processing of the application. Since the Board found that more than fifty-five per cent of the employees in the bargaining unit at the time the application was made were members of the union at the terminal (and membership) date, the Board certified the union without a representation vote. Similarly, in *Peter Austin Manufacturing Company, Division of Kelton Corporation Limited*, [1967] OLRB Rep. May 144, the Board granted certification without a vote because it was of the view that the 42 persons employed in the bargaining unit “on a year-round basis” constituted “a substantial and representative number of persons in the employ of the respondent” (which manufactured toys), despite the fact that the regular cyclical fluctuation to which the work force was subject would result in a group of approximately fifty additional production workers being hired in about two months time for the remaining six months of that year.

11. As in the *Filkon* and *Peter Austin* cases, the employment level at the time of the present application (603 employees) constituted a substantial and representative number of the persons in the employ of the respondent (during the period from September to late April). Therefore, if the applicant were able to satisfy the Board that more than fifty-five per cent of those employees were members of the applicant on May 10, 1982 (the terminal date, and the membership date determined by the Board under section 103(2)(j)), the Board could certify the applicant without a representation vote. However, the applicant does not purport to be in a position to do so. Thus, if it is to obtain bargaining rights, it must win a representation vote. It is this aspect of the case which has presented the Board with some difficulty. Unlike the *Filkon* and *Peter Austin* cases, the persons employed in the proposed unit on the terminal date (and the persons who would be employed at the time at which a pre-hearing vote would be taken in the normal course of events) are not persons employed in the unit on a year round basis, nor can they be said to be substantially representative of the persons who are generally employed in the unit during the period from September to late April. Quite to the contrary, they are only



a small fraction of such persons, and a highly disproportionate number of those who make up that fraction are graduate students in Psychology or Economics.

12. The timing of a representation vote is a matter that lies within the discretion of the Board, as does the determination of the persons eligible to cast ballots in such vote (see section 68(a) and (c) of the Board's Rules of Procedure; see also section 103(2)(f) of the Act). In *Island of Bob-lo Company*, [1970] OLRB Rep. May 211, both of the employees in the bargaining unit, at the time that a termination application was filed with the Board, had signified in writing that they no longer wished to be represented by the respondent trade union on April 24, 1970 (the terminal date fixed by the Board in respect of that application). However, since the company's amusement park operated only during the summer months, the Board deferred the taking of the representation vote until after June 1, 1970 when a representative number of the company's full complement of approximately 13 workers would be employed in the bargaining unit.

13. Although we are concerned that deferral of a pre-hearing representation vote will delay the processing of this application somewhat, we are nevertheless of the view that an approach similar to that adopted in the *Bob-lo* case should be applied by the Board in the circumstances of this case in order to avoid unreasonably disenfranchising a very substantial number of employees who will have to work under the labour relations regime determined by the outcome of the vote. Accordingly, having regard to the cyclical and relatively high turnover aspects of employment in the university graduate (and undergraduate) student context in which this case arises, the Board is of the view that the proper balancing of the various labour relations interests involved in the case requires that the taking of a pre-hearing representation vote (which will, of course, only be taken if on the basis of the Labour Relations Officer's pre-hearing vote report it appears to the Board that not less than thirty-five per cent of the employees in the voting constituency hereinafter described were members of the applicant at the time the application was made) be deferred until October of 1982, when a representative number of employees will be in the bargaining unit so that the Board can properly satisfy itself, within the scheme of free employee choice and majority representation established under the Act, as to whether or not a majority of the those in the unit desire to be represented by the applicant trade union in their employment relations with the respondent. The persons eligible to cast ballots in such vote would be the employees in the following voting constituency on the date the vote was directed (or on such other date as might be specified by the Board in its decision directing the vote) who did not voluntarily terminate their employment or who were not discharged for cause between that date and the date the vote was taken:

All employees of the respondent engaged in teaching, tutoring, marking, demonstrating, lecturing or employed as research assistants, who are enrolled as graduate students in the School of Graduate Studies and Research at Queen's University at Kingston and who are paid out of operating funds; save and except regular faculty and persons covered by existing collective agreements.

In view of the dispute with respect to the appropriate bargaining unit, undergraduate students enrolled at Queen's University, and graduate students enrolled in teaching, tutoring, marking, demonstrating, lecturing or employed as research assistants, who are paid out of operating funds, would also be permitted to cast ballots in such vote, but their ballots would be segregated and not counted pending determination of the appropriate bargaining unit.

14. Accordingly, Labour Relations Officer S. Nicholson is hereby directed to convene a meeting of the parties to this application pursuant to her appointment dated April 30, 1982 in this matter.

15. This matter is referred to the Registrar.

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**2010-81-R; 2011-81-U** United Steelworkers of America,  
Applicant/Complainant, v. Automotive Hardware Limited, Federal  
Bolt and Nut Corporation Limited, Automatic Screw Machine  
Products Limited and **Securicor Investigation and Security Ltd.**,  
Respondents

**Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Complaint filed against several respondents – Settlement reached with all but one respondent – Whether union may proceed against remaining respondent – Board not applying common law rule that release of one tortfeasor releases all**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members F.W. Murray and W.F. Rutherford.

**APPEARANCES:** *Brian Shell, J. de Klerk and John Fitzpatrick for the applicant; R.A. Werry for the respondents Automotive Hardware, Federal Bolt and Nut Corporation and Automatic Screw Machine Products; E.B. Cumine, Q.C. and Dean Peroff for the respondent Securicor Investigation and Security Ltd.; John J. Chalmers for Const. M. McClure*

**DECISION OF THE BOARD; May 18, 1982**

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

2. These complaints, filed under section 89 of the Act during the currency of a protracted strike, allege violations of section 15, 64, 66 and 70 of the *Labour Relations Act*. Automotive Hardware Limited, Federal Bolt and Nut Corporation Limited and Automatic Screw Machine Products Limited (hereinafter referred to as Automotive) were named as respondents. A section 1(4) application in respect of the automotive companies was also filed. These matters were adjourned *sine die* on January 11, 1982. By letter dated February 26, 1982, the complainant requested to have Securicor Investigation and Security Ltd. (hereinafter referred to as Securicor) added as a respondent and set out particulars in support of an allegation that one or more of the automotive companies made an arrangement with Securicor and/or David Ivers, an employee of Securicor, whereby Ivers became an employee of one of the automotive companies in order to infiltrate the trade union.

3. These matters came on for hearing on March 16, 1982. The strike between the complainant and the automotive companies had been ongoing for almost six months at the

time. With the assistance of the Board panel assigned to hear the case, the complainant union and Automotive reached an agreement, confirmed in an oral ruling, under which the complainant and Automotive would resume bargaining towards a renewal collective agreement. The agreement provided that:

- (a) the matter be adjourned to March 31, April 2, 14, 15 and 20;
- (b) the parties resume bargaining under the auspices of a mediator and continue bargaining so long as, in the opinion of the mediator, bargaining was productive;
- (c) the company reinstate bargaining unit employees seeking reinstatement under section 73(1) of the Act, as if the 6 month time period stipulated in the section had not elapsed, until the Board's determination was made.

4. The mediator required the parties to be present at a bargaining session commencing at 10:00 a.m. on March 31st. Although the complainant wanted both to bargain and to proceed with its complaint at the same time, the Board adjourned the proceedings on its own motion. The parties continued to bargain on April 14th and reached a tentative settlement which resulted in a request for an adjournment on April 15th. The Memorandum of Settlement was ratified on Sunday, April 17, 1982.

5. The complainant, by letter dated April 19, 1982, advised the Board that as a result of the agreement it had reached with Automotive, it was requesting leave to withdraw its complaint against the Automotive companies. The union further advised the Board that:

"The United Steelworkers of America takes note that the only respondent who remains named in this complaint is Securicor Investigation and Security Ltd.

The particulars of alleged violations of the Labour Relations Act in respect of Securicor Investigation and Security Ltd. are set forth in our letters to the Board dated February 26, 1982 and March 4, 1982.

The United Steelworkers of America will be seeking remedial relief from only Securicor Investigation and Security Ltd."

6. The essence of the complainant's allegations against Securicor relates to the activities of one David Ivers; alleged to be an employee of Securicor. It is alleged that on or about the end of August, 1981 or early September, 1981, one or more of the Automotive companies made an arrangement with either Securicor or with David Ivers, an employee or agent of Securicor, whereby Ivers became an employee of one of the Automotive companies in order to carry out duties as spy and agent provocateur. It is alleged that during the strike Ivers received strike and welfare assistance from the complainant union, while at the same time counselling striking members of the bargaining unit to engage in a number of criminal acts.

7. Securicor takes the position that the Board should deny the complainant's request to withdraw against the Automotive companies. Alternatively, Securicor argues that if the



Board allows the request, the effect must be to “wipe out” the complaint against Securicor. Finally, Securicor argues, in the alternative, that if the Board allows the request and does not “wipe out” the complaint against Securicor, it must allow Securicor to add Automotive as a respondent to these proceedings.

8. The respondent Securicor advances three arguments in support of its alternate positions. Firstly, Securicor argues that the law of “joint tortfeasor” applies to the interpretation of the *Labour Relations Act* so that a release of one of the tortfeasors (the Automotive companies in this case) is a release against all. Secondly, Securicor argues that it is a denial of natural justice to allow the complainant to withdraw against Automotive, as part of an agreement exclusively between those parties, to leave it in a position where, as the agent of Automotive, it may have to call evidence from persons employed by Automotive, the principal, who may be adverse in interest. Thirdly, Securicor relies on the express wording of section 64 and 66 of the Act, sections cited by the complainant, and argues that an essential ingredient of a contravention of either section is the requirement that the party found to be in contravention be “acting on behalf of an employer or employers’ organization”. Securicor argues that the complainant, by its action in withdrawing against Automotive, has recognized that Automotive has done nothing wrong, so the essential element referred to above has been removed in respect of the agent. Securicor maintains that if the Board allows the complainant to proceed against it in these circumstances, it will be exceeding its jurisdiction.

9. The complainant argues firstly that the reference to “an employer” in both section 64 and section 66 is not limited to the employer party to the relationship with the complainant union and, therefore, for purposes of this complaint, Securicor is an employer within the meaning of the section. We find this argument to be without merit. The complainant argues secondly, that sections 64 and 77 refer specifically to a “person acting on behalf of an employer” and, therefore, it cannot be a denial of natural justice or an excess of jurisdiction to proceed against a “person acting on behalf of an employer.” In the complainant’s submission the statute specifically identifies the agent as a proper and separate party respondent. The complainant argues that there is nothing in the agreement between itself and the Automotive companies that in any way limits or prevents Securicor from calling whatever evidence it wishes in defence of the allegations against it. There is no denial of natural justice. Finally, the complainant argues that if it is found on the evidence that the Automotive companies and Securicor were acting in concert or were in some sense similar to the position of joint tortfeasors at common law, it is within the discretion of the Board to fashion a remedy which takes into account the decision of the complainant to withdraw against the Automotive companies. In the complainant’s submission, the Board should not force it to proceed unwillingly against Automotive or prevent it from proceeding against Securicor which, it is alleged, has also breached the Act to the union’s detriment. The complainant cautions, however, that although Securicor is an agent of the Automotive companies it may have acted at times without the approval of Automotive.

10. The respondent Automotive takes the position that the Board should respect the agreement between itself and the complainant but maintains that having resolved the labour relations dispute the complainant should consider withdrawing the complaint.

11. Both Securicor and the complainant cited policy considerations in support of their respective positions. Securicor argues that to proceed on the basis suggested is to go beyond the entire purpose for which the Board exists. In circumstances where the collective agreement

has been signed and the allegation of bargaining in bad faith withdrawn against Automotive, and where the relief now sought can be obtained in the courts, Securicor argues that the matter can no longer be characterized as pertaining to the employer/employee relationship. The complainant union, on the other hand, argues that although the remedial relief sought is extremely broad, the allegation before the Board arose in the context of a lengthy strike and involves conduct which strikes at the heart of the union's rights as established under the *Labour Relations Act*. The allegations involve breaches of the *Labour Relations Act*, moreover the use of paid agents to infiltrate a trade union or foment disruption raises important labour relations policy questions which should be determined in that context. The complainant maintains that in these circumstances the Ontario Labour Relations Board is the appropriate forum.

12. As we have already noted, Securicor contends that the Board should resolve the complaint before it as if Securicor and Automotive are "joint tortfeasors" so that a release against one, releases the other. In order to evaluate this argument, and assess its utility (directly or by analogy) in interpreting the *Labour Relations Act*, it will be necessary to refer briefly to the meaning attributed to the concept at common law.

13. The most often cited definition of "joint tortfeasor" is contained in the dicta of Scrutton L.J. in *The Koursk* [1924] p. 140; 93 L.J.P.R.; 131 L.T. 700; 40 T.L.R. 399:

"The substantial question in the present case is: What is meant by 'joint tortfeasors'? and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another."

It is to be noted that where an agency or an employment relationship is relied upon as creating joint tortfeasance, the agent or the employee, as the case may be, must have acted "in the course of his employment" or "within the scope of his authority". There must exist concurrence, either active or passive, towards achieving a common end. It is by no means certain on the filings before us that Automotive and Securicor are in a position analogous to joint tortfeasors in respect of all of the alleged misconduct. In so far as Securicor acted beyond the scope of its authority they would not be.

14. If two or more persons are found to be joint tortfeasors, a release against one is a release against all the others. However, if instead of releasing one joint tortfeasor from the cause of action the plaintiff merely gives a covenant not to sue, the plaintiff is not barred from continuing his action against the other joint tortfeasors (see *Cutler v. McPhail* [1962] 2 All E.R. 474, *Dixon v. R. in the Right of B.C. and B.C. Hydro and Power Authority* [1979] 2 WWR 289). The basis for this subtle and difficult distinction is set out in *Duck v. Mayer* [1892], 2 Q.B. 511, the leading case on point:

"It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or

other joint debtor, *the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released*... It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor... *the reason being that the joint action is still alive*. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor." (Emphasis added)

15. The agreement between the complainant and Automotive was not put before the Board and we have no way of knowing, therefore, whether we are dealing with a release or a covenant not to sue. It is to be noted however, that the courts have recognized not just an express reservation of the right to sue other joint tortfeasors but an implied reservation as well. (See *Apley Estates Company Limited v. DeBernales* [1947] 1 Ch. 217 (C.A.), *Gardiner v. Moore* [1969] 1 Q.B. 55). We are satisfied that the complainant, in entering into its agreement with Automotive, had no intention of releasing Securicor. Be that as it may, we do not have to decide if we are dealing with a release or a covenant not to sue.

16. These rules have long been recognized as overly technical and counterproductive to a settlement of outstanding litigation. Fleming, John G. in *The Law of Torts*, 5th Ed, at p. 241 refers to the "release of one releases all" rule as an anachronism that has miraculously escaped statutory reform. He states that this "nefarious" rule "would not have survived so long if the whole category of joint torts were not so narrow, and a convenient, if pettifogging, escape were not available to those with knowledge of legal niceties by employing a 'covenant not to sue' rather than a 'release'." He then goes on to say that the bias in modern times is evidenced by the fact that courts are willing to imply a reservation, where it is not expressed. In *Apley Estates*, *supra*, at page 221, Morton, L.J. said of the "release rule" "... it must necessarily follow that a release of that cause of action against one is a release of that cause of action against all. That is a rule which, in my judgement, should not be extended beyond the limits within which it has hitherto been confined. It is a rule which has often operated to work hardship and I, for one, am certainly not prepared to extend it in any way." As for the position of the United States, "Today, courts and state legislatures have realized the inconsistency and inequity of compelling the plaintiff to give up the opportunity of settling with one joint tortfeasor because he would thereby lose his cause of action and be without complete compensation. Many states have enacted statutes which prevent a release from discharging a second tortfeasor unless the terms of the release so provide", Loretta V. Kepler, *Joint Tortfeasors — The Effect of a Release — Harris v. Grizzle*, *Land & Water Law Review*, 337-347, Winter '80. In *Bryanston Finance v. de Vries* [1975] Q.B. 703, [1975] 2 All E.R. 609 Lord Denning referred to the rule as "an arid and technical distinction without any merits" and as a "trap into which the unwary fall but which the clever avoid."

17. The concept of joint tortfeasors is both complex, and in some respects highly technical. We are not bound as a matter of law, to apply it in interpreting and applying the *Labour Relations Act*. Certainly nothing in the statute expressly requires the Board to do so, and we see little wisdom or utility in importing so technical a common law tort concept as the touchstone for interpretation of statutory rights. We will be governed in this matter by the wording of the statute, the requirements of natural justice and by labour relations policy considerations.



18. Section 64 and 66 of the read:

“64. No employer or employer’s organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

• • •

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.”

19. Securicor is not an employer or employers’ organization and, therefore, in order to be within the ambit of either section, Securicor must be a “person acting on behalf of an employer or an employers’ organization.” If a private security company contracts with an employer party to a labour dispute to provide security services in connection with that dispute for a fee, it is difficult to resist the conclusion that the security company is a person acting on behalf of the employer, subject to the prohibitions contained in sections 64 and 66 of the Act. In these circumstances, it does not lie in the mouth of the security company, in defence of allegations that its conduct in connection with the labour dispute has breached section 64 or 66 of the Act, to claim that it exceeded the authority of the employer and, therefore, was not acting on behalf of the employer and cannot be brought within either of these sections. These sections are designed to protect important union and employee rights from employer interference and where a person is acting in a labour dispute under the general authority of the employer that person is brought within the ambit of these sections in respect of all of its action, including those which may be outside of its specific terms of reference. We are not about to interpret the words “acting on behalf of” in such a way as to allow third parties in contractual relations with the employer to provide services in connection with a labour dispute to violate employee and union rights and then rely on carefully worded contracts to take themselves outside the ambit of the Act. Given the purpose of the statute and the specific language of these sections, a person in contractual relations with an employer to provide security services in connection with a labour dispute is acting on behalf of the employer within the meaning of these section. Securicor, therefore, if in contractual relations with Automotive, was subject to the prohibitions contained in sections 64 and 66 of the Act throughout the totality of its involvement in the labour dispute between the complainant and Automotive. If the complainant had not withdrawn against the employer there is no question that Securicor would have been a properly named respondent.

20. Does the withdrawal of the complaint against Automotive constitute a

withdrawal against Securicor, and, if it does not, should the Board refuse to grant the request to withdraw against Automotive? Failing a natural justice impediment, the answer to the question posed at the outset of this paragraph is no. As we have stated, Securicor, as a separate entity in contractual relations with the employer and charging a fee for its service, is subject to the prohibitions contained in section 64 and 66 of the Act. The statute clearly identifies “a person acting on behalf of an employer” as an independent actor capable of breaching the law, and therefore capable of being a separate respondent in its own right. In so far as the merits are concerned, therefore, Securicor must stand or fall on its own conduct. The fact that the union agreed not to proceed against Automotive as part of the overall settlement to a protracted labour dispute does not in any way lessen the obligation upon Securicor to act within the statute. From a policy stand point, the matters complained of, if proven, are sufficiently destructive of the collective bargaining process as to suggest to the Board that if the requirements of natural justice can be satisfied it should inquire into them.

21. In our view, this matter can proceed against Securicor without breaching the requirements of natural justice. By withdrawing against the employer, the complainant has lost the advantage of the reverse onus in section 89(5) of the Act so that the complainant will be required to proceed first and to establish its allegations on the balance of probabilities. Securicor will know in advance precisely the case it must meet. Securicor has first hand knowledge of both the extent of its authority to act in this matter and of its action. There is no restriction on Securicor with respect to the evidence it might wish to call. If Securicor calls as its witnesses employees of Automotive who show themselves to be adverse, there are procedures to deal with this eventuality. Given the discretion of the Board with respect to remedy, we do not see any natural justice impediment to proceeding against Securicor as a party alleged to have breached section 64 and 66 of the Act.

22. The prohibition against intimidation and coercion contained in section 70 of the Act extends to persons acting on their own behalf. There is no requirement under the section for a person to be acting on behalf of the employer. Section 70 provides:

No person, trade union or employer's organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

If it is proved that the agent's actions, once disclosed, have an ongoing coercive impact in the exercise of employee rights under the Act, including the right to strike, then, arguably at least, the agent has breached the section and is subject to the remedial authority of the Board. In so far as a breach of section 70 is alleged, therefore, the withdrawal of the complaint against Automotive cannot affect the complaint against Securicor.

23. In summary, the Board has before it a complaint against Securicor; a private company in contractual relations with the employer, Automotive, to provide security services for a fee in connection with a labour dispute. The complainant union as part of a settlement to the labour dispute (a long and bitter strike) has agreed to withdraw the complaint against the employer. Securicor argues that the effect of this withdrawal is to create a withdrawal against itself or, alternatively, if the matter is to go on, the agreement between the parties to the labour dispute must be ignored and the request to withdraw against Automotive rejected. We have

determined that if Securicor was in contractual relations with the employer, it is regulated by the prohibitions contained in section 64 and 66 of the statute in all of its activities in connection with the labour dispute. Furthermore, we have satisfied ourselves that if we allow the complainant to proceed against Securicor alone, the requirements of natural justice can be met. Furthermore, a breach of section 70 is alleged against Securicor and we have found that as a "person" within the meaning of that section, Securicor must defend that aspect of the complaint. Finally, we are satisfied that the allegations against Securicor give rise to an issue which the Board, with its specialized knowledge, should inquire into.

24. Having regard to all of the foregoing, we hereby consent to the withdrawal of this complaint against Automotive and allow the complainant to proceed against Securicor. Having withdrawn against the employer Automotive, the complainant loses the advantage of the reverse onus and may have prejudiced itself with respect to the extent of the remedial relief granted if the allegations are proven.

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**1347-81-U; 1356-81U** Giuseppe Brundia, Donald Pye, Russel Spotton, Lawrence Ozzard, Gruliano Mior, Martin Parent, Robert Morris, Ilias Kottaras, George Haralampous, Chris Silver, James Millar, Robert Shorten and Leslie McBean, Complainants, v. Teamsters Union Local 879, and Teamsters Union Local 938, Respondents, v. **Softley Cartage Limited** and Donline Haulage Inc., Interveners; Softley Cartage Ltd., or Donline Haulage Employees, Complainants, v. Teamsters Union Local #938 and #879 (Donline Haulage and Softley Cartage Ltd., employers), Respondents

Duty of Fair Representation – Remedies – Unfair Labour Practice – Company acquiring shut-down company – Union's request that seniority be dovetailed refused by company – Union accepting proposal of forming shelf company for operations of shut-down company – Union's conduct not breach of Act – Union failing to meet reasonable standard of communications with complainants – Whether failure to communicate breach of the Act – Litigation occasioned by union's failure to communicate – Board not awarding costs

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members H. Kobryn and F. W. Murray.

**APPEARANCES:** *Howard Levitt, Chris Silver and Ilias Kottaras for the complainants; Ken Petryshen, Charles Thibault and Joe Contardi for the respondents; Robert Howard and Brad Grant for Softley Cartage Limited; no one for Donline Haulage Inc.*

**DECISION OF THE BOARD;** May 26, 1982

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the



respondent trade unions have dealt with the complainants contrary to the provisions of section 68 of the Act. Section 68 reads:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complaint arises out of the acquisition in November 1980 of the remaining assets of Donline Haulage Inc. (hereinafter referred to as "Donline") by Softley Cartage Limited (hereinafter referred to as "Softley"), and the resultant determination of seniority rights of the employees of each company with respect to those of the other. The Teamsters Union in a broad sense holds the bargaining rights for employees of both companies, but it is Teamster practice to have bargaining rights in the hands of a particular Local, depending upon the geographic location of the company's terminal. Donline's terminal was in Mississauga, and accordingly, its employees were represented by the "Toronto" Local, 938. Softley, on the other hand, operated from Milton, and its employees were represented by the "Hamilton" Local, 879. Both companies were in the aggregate-hauling business.

3. The evidence establishes that the business of Donline had been on the decline for some time. While this type of business always drops off dramatically in the winter months, Donline for the first time in 1980 underwent substantial layoffs in the summer-time. This was evident to the respondent Local 938, who receives a monthly dues check-off from the employers it has contracts with, and in particular to the business agent Jim White. Mr. White first heard in November 1980 of the intentions of Donline to sell out to Softley. Mr. White was anxious to have a meeting with the companies and Local 879, representing Softley employees, to discuss arrangements for the transfer of Donline employees to Softley. It was his intention to achieve an agreement whereby the seniority of employees between the two companies would be fully "dovetailed", i.e., every employee would be placed on a merged seniority list according to the full seniority he had accumulate with *either* company.

4. The meeting took place on December 9th. Donline employees had already received from their former employer the following letter:

As of November 21, 1980 managment has agreed to transfer the operation of the business to Softley Cartage Limited.

Softley Cargae officially took over the operation on November 17, 1980.

This firm for the time being will still be operating under the name of Donline Transport Inc.

We will release all vacation pays up to November 16, 1980 on Wednesday November 26, 1980. All vacation pays after this date will be paid by Softley Cartage Ltd.

The payroll and benefits will be transferred to Softley as of November 17, 1980 according to the Union Agreement.

The management sincerely thanks each one of you for the tremendous efforts and dedication you have shown during your employment with this firm.

We are sure you will continue to work with the same enthusiasm with the new employer and we will strongly support you.

Donline employees continued to work out of the Mississauga yard, and were paid by Softley cheques. They were being dispatched by the Softley dispatcher, sometimes for Softley customers, and their tires were being changed by the Softley tireman. In mid-November, Donline had some 10 to 15 drivers working, and by early December, that was down to 5 or 6. As drivers were laid off, they received separation notices bearing the name "Softley Cartage Limited".

5. The meeting of December 9th was attended by representatives of both Locals, and of Softley. Jim White was present for Local 938, Joe Contardi and Len Schultz for 879. Both Locals at this point thought that the two companies were being merged, and had considered on their own the provisions in both collective agreements which might have a bearing. Article 9 of the Donline agreement deals with "Mergers", and provides:

## *ARTICLE 9*

### *MERGERS*

#### *Section 9.1*

If the Company acquired by way of purchase or in any other manner, the business or undertaking of any other employer and such operations are merged the seniority of all active employees will be dovetailed including those employees who are off work due to sickness or injury. If the Company acquiring the business or undertaking does not require all the employees after the merger, lay off will commence at the bottom of the dovetailed active seniority list and such employees will remain on the active seniority list for purpose of recall.

#### *Section 9.2*

In the event any of the Companies affected by the merger have laid off employees prior to the merger, the seniority of those employees on lay off will be dovetailed. Such employees will be on the inactive seniority list. If the merged Company subsequently requires additional employees preference will be given, subject to the recall provisions of Article 8, first to those laid off employees on the active seniority list, then to those employees on the inactive seniority list in accordance with their seniority and qualifications. If and when an employee who is on the inactive seniority list is recalled and reports for work in accordance with this Article, his original seniority will be dovetailed with the seniority of the active employees.

### Section 9.3

In the event that the preceding paragraphs in the opinion of either party fail to provide adequate protection of seniority rights at the time of purchase, and merger, then the seniority of the employee in the combined operations shall be determined by agreement between the successor Company and the Local Union or Unions concerned. If mutual agreement is not reached, the conditions outlined in Article 10.1 and 10.2 will apply.

This clause only bound *Donline*, however, in the event that *it* purchased a business, or expanded, and the Local Unions correctly concluded that the clause had no application to the present situation. That conclusion is not now being contested by counsel for the complainants. The respective legal position of the two groups of employees, therefore, fell to be determined by the seniority clause in the purchasing company's (i.e., Softley's) collective agreement. The evidence is that seniority rights in the trucking industry are *terminal-wide* only. This means that no employee transferred from one terminal to another (*even within the company*) has the right to come on the terminal seniority list over an employee already *at* the terminal. Rather, the transferring employee is placed at the bottom of the seniority list. Consistent with this practice, Article 9.03 of the Softley agreement reads:

Seniority among the drivers in the driving force shall be branch wide at Milton, Ontario.

It is clear, therefore, that from a *legal* point of view, no former employee of Donline transferring from the Mississauga operation to the Softley operation at Milton would have the right to be "dovetailed" (or placed ahead of any existing Softley employee) on the Softley seniority list. This was an extremely important protection from the perspective of Softley employees, because Softley was a newer company than Donline. Virtually all of the Donline employees had longer service with Donline than Softley employees had with Softley, and there were more Donline employees on their own seniority list than Softley had trucks. In these particular circumstances, a "dovetailing" of the seniority lists would have meant an immediate layoff of virtually all of the Softley employees, and this consequence was fully apprehended from the start by all parties, including the complainants.

6. Notwithstanding the lack of any legal support for the concept of "dovetailing" under the collective agreements, both Charles Thibault, the President of Local 938, and Joe Contardi, the President of Local 879, testified that it was their practice when two companies merged to try to recognize the seniority of employees at *both* companies in a manner that was fair and equitable. This meant that employees from the disappearing company would be afforded the opportunity to dovetail into the purchaser's seniority list to the extent that actual jobs moved across. That is, the transferring employees would be permitted to follow their jobs, but not to take jobs away from existing employees of the purchaser. Mr. Thibault and Mr. Contardi were both aware, however, of situations where one company simply acquired the licences of another failing company, and no actual work moved across. In such cases, no dovetailing was justified or permitted.

7. The company was represented at the December 9th meeting by Mr. Grant, one of its owners, and Mr. Howard, the company's solicitor. Mr. Contardi of Local 879 asked the



company what was happening. He said his members (the Softley employees) had heard about Donline employees being paid on Softley cheques, and were becoming concerned about their own rights. The company responded that it was only managing the Donline operation until it could be phased out and its assets sold. The company indicated that it felt no dovetailing of employees was warranted, and asked what the position of the Unions would be if the two companies merged. Mr. Contardi responded that the Union would be looking at dovetailing, and then began to question the company further about how much work would actually be going over. The company explained that only two or three of Donline's customer contracts were continuing, and that the rest had been eliminated because of lack of revenue. The company estimated that there would be work for three to five men. The Unions then asked for a recess in order to discuss the matter amongst themselves. Mr. Contardi expressed his concern to Mr. White that the number of jobs not be over-estimated, as he had to justify the number being dovetailed to his own men. Mr. Contardi stated that, based on what the company had said, he could buy the number "five". Mr. White said that that sounded fair. The Unions then reported their consensus to the company, and the company said it would think about it.

8. Mr. White reported back to Mr. Thibault, the President of Local 938, the results of the meeting. Mr. Thibault had known for some time that Donline was in financial trouble, because it was continually late with its dues remissions, notwithstanding the hefty penalty clause in the collective agreement. But he was aware that there were 10 to 15 members at work for Donline during the month of November, and he had difficulty understanding how the number "five" was arrived at. He accordingly directed White to set up another meeting.

9. The second meeting took place on December 15th. Mr. Grant and Mr. Howard again attended for the company, Mr. Thibault, Mr. White and Mr. Contardi for the Unions. Mr. Schultz was tied up elsewhere in negotiations. Again the company outlined its plans for phasing out the Donline operation, this time with Mr. Thibault asking the question. After listening to the company's explanation of how many contracts remained, and how many Donline trucks were being scrapped or sold, he too was prepared to accept the figure of "five" for dovetailing purposes. The company then asked for a fuller explanation what the Union had in mind by "dovetailing". Mr. Contardi explained that each employee would go on the seniority list according to his natural seniority with either company. He added that some employees would be unhappy, but that was the way it was. The company was concerned that the five Donline employees would go to the top of the Softley seniority list, as, Mr. Contardi acknowledged, was he. The remaining Donline employees had by this time been temporarily laid off, and only 5 or 6 drivers were still working at Softley. The immediate effect of even the limited dovetailing being discussed for the combined operation would thus have been to put all of the remaining Softley employees temporarily on the street. The company asked whether the seniority list could be dovetailed by alternating, i.e., one Softley employee and then one Donline employee, etc. Mr. Contardi replied that that was not the way it was done. The company then asked for a recess.

10. When the meeting resumed, the company asked the Unions what their position would be if Softley put the Donline operation into a shelf company called "Rideau Cartage". Mr. Thibault replied that the Donline collective agreement would have to follow the work. It should be noted here that the Donline agreement was substantially better for employees than the Softley agreement in a number of respects, including rates of pay. The company said that it would consider its options and let the Union know its decision at a later date.

11. In early January the Teamster Locals were contacted by the company and told that it had elected to go “the Rideau route”. It advised that the Donline operation would be carried on through Rideau Cartage Limited, and that all of the terms and conditions of the Donline collective agreement would be honoured. It advanced the hope that Rideau would gradually build itself up to the point where even more employees would be needed than actually remained on the Donline recall list, and promised that all Donline employees would be recalled as needed in strict accordance with that list. While both Mr. Thibault and Mr. Contardi acknowledged before the Board that this provided no assurance that work would actually be built up in Rideau, they felt that this undertaking by the company was the best that the Donline employees could hope for in a bad situation. It offered at least a prospect of recall for all of them.

12. It did not, however, work out that way. Only 3 to 5 of the former Donline employees were recalled into Rideau from January through March, according to the dues remissions which Mr. Contardi looked at, 7 in April, 9 in May and 14 in August. The latter figure appears to be a result of a telephone call from Mr. Grant of Softley to Mr. Schultz, the business agent, requesting additional men for the vacation period. Schultz conferred with Contardi, and then suggested to Mr. Grant that the Donline employees be recalled first. The company apparently did this, through Rideau. Finally, in late September of 1981, when the old Donline’s licence expired, all of the former Donline employees were permanently laid off. To that point, the company at all times had continued to honour the Donline collective agreement when employing former Donline employees, and all of the employees recalled by Rideau, although performing the same work as Softley men, were paid at the higher rate. The company at one point in the spring had asked Mr. Schultz whether he would consider negotiating a single collective agreement when the two collective agreements expired in 1982. Mr. Schultz simply replied that he would be retiring before then, and that the company would have to discuss that with the new man. There was no indication from the company that it was the matter of seniority rights which it was looking to re-negotiate, and any attempt to do so would, of course, have required the same balancing of employee interests which took place in December 1980.

13. When Rideau first began operating in January of 1981, it used a terminal taken over from Motorways Ltd. in Stoney Creek. Before long, however, the Donline trucks were being operated out of the Milton yard, alongside Softley trucks, and on most if not all of the Softley jobs. The complainants throughout have placed great emphasis on this “intermingling” of the two groups of employees. Their evidence, however, clearly establishes only that Donline employees and trucks were being used to perform work on *Softley* contracts, and not the reverse. Mr. Kotteras, for example, testified that he believed he worked on every job that Softley had. The only clear reference to Softley drivers performing work for a customer of Donline was in relation to KVN Contractors, but the evidence of Mr. Schultz establishes the KVN had always been a customer of Softley Cartage as well. For the reasons given earlier, this factual issue is irrelevant to the seniority rights of the complainants, from a legal point of view, but the Board would note that if Donline work was in fact being taken over by Softley drivers in a manner beyond that articulated by the complainants in their evidence, there is no allegation that the officials of either Local were made aware of it. While Mr. Thibault, Mr. White and Mr. Schultz all indicated that the company had sole discretion as to what, if any, work was to go to Rideau, Mr. Contardi appeared to express a more credible view of the “understanding” with the company when he surmised in his evidence that “if we had a clear-cut case of Donline work going to Softley, we could have got into an argument [with the company]”. As indicated, however, no such cases were articulated before the Board.

14. In April, the Donline employees finally called a meeting amongst themselves, and attempted to file a grievance over the fact that the “junior” men were working. The Union steward, Bill Woods, was at the meeting, and as one of the most senior of the former Donline employees, was one of the few employees there who was actually working (for Rideau). Mr. Woods reluctantly agreed to put in the grievance, but would not sign it. He was quoted by more than one of the complainants as saying that he was still working, and “didn’t want to make waves”. The grievance began with the words: “As employees of Softley...”, and was returned by Mr. Woods a few days later. He said that the Company refused to accept it, because the men were not employees of Softley. The evidence of Mr. Schultz is that he met with the company over the grievance, and that the company did in fact refuse to accept it. Mr. Schultz then went to Mr. Contardi for guidance, and Mr. Contardi suggested that it be re-filed in *all* of the company names (i.e., Donline, Rideau and Softley) to make sure that the company had to accept it. Mr. Schultz testified that he told Mr. Woods to pass that on to the complainants. The complainants testified that they were told by Woods only that the grievance was refused because they were not Softley employees. Mr. Woods himself failed to testify.

15. There was also a statement attributed to Mr. Grant, at a heated meeting with Softley employees concerned about losing their own jobs, to the effect that the company had to take the Donline employees on, but that they would make it so difficult for them, they wouldn’t last. There is no evidence, however, that this statement (even assuming that the respondents could do anything about it) was communicated by any of the complainants to a responsible trade union official. It appears that Softley was in fact hiring new employees at some point while Donline employees remained on layoff. The complainants acknowledge, however, that the respondents were unaware that this was happening, because Softley was deliberately letting these people go just before they completed their probationary period and had to join the Union. The Board accepts that from the beginning of Rideau’s operation, it looked to the respondents like the company was essentially living up to its undertaking. Recall to Rideau was undoubtedly slow, and the work irregular, but in the winter of 1981, essentially the same conditions pertained at Softley. Mr. Schultz did on occasion talk to former Donline employees working at the Milton terminal in March and April. He simply confirmed from them that recalls to Rideau were proceeding in order of seniority, and that they were being paid at the Donline rate. Mr. Schultz was aware that Softley was using brokers from time to time, but this was when all of Softley’s equipment was already engaged. The situation with Donline/ Rideau, who were in the process of selling off obsolete equipment from the start, was different in Mr. Schultz’s view from an active Teamster employer divesting itself of its equipment for the sole purpose of converting to brokers. The latter situation, he confirmed, would call for a “heart to heart” talk with the employer, but not the situation which Softley was in with Donline. Mr. Schultz also testified that he did not consider it unusual to have two companies operating out of the same terminal, but with separate seniority boards. He testified that the Grants had on occasion done just that with another of their related companies, John Grant Haulage, albeit on a more temporary basis.

16. Reviewing the evidence as a whole, it becomes apparent that the respondent trade unions, and in particular Local 938 who initially held the responsibility for the complainants, concluded in December that little could be done for the former employees of Donline. Their years of service, their seniority rights, and their established relationship with management all rested with Donline, and Donline was gone. Softley owed nothing to these employees on either a legal or loyalty basis, and in light of their obligations to the drivers who had built up their own company, was clearly not disposed to doing anything which would prejudice the rights of



those existing employees, or its relationship with them. It had not taken the Softley employees long to recognize the threat which the purchase of Donline posed to them, and the pressure on their employer began at once. When Softley decided (unfortunately, from its point of view, *after* adding some of the Donline employees to the Softley payroll) to avoid the problem with its own drivers by setting up Rideau, the last lever that the respondents (Local 938 in particular) had for applying moral suasion was gone. The two corporations and respective "employers" remained legally identifiable as separate entities. There was in fact no "merger" in the sense on which the respondents had based dovetailing in other situations. Softley continued to apply the higher collective agreement to all former Donline employees to the extent they were employed, and this is the most that an application to the Labour Board under section 1(4) ("related employer") or even 63 ("sale of a business") could achieve. Contrary to the submission of the complainants, there is nothing in either the language or spirit of section 63 which would cause the Board to alter the language in a collective agreement to affect the seniority rights of one group of employees over another. Cf. *Bermay Corporation*, [1980] OLRB Rep. Feb. 166; and consequent arbitration in *Bermay Corporation*, 30 LAC (2d) 402. Section 63 is concerned with the preservation of bargaining rights; it simply permits the Board, to that end, to declare which if any existing collective agreements still apply, or to amend the "definition of the bargaining unit" in those collective agreements where necessary to avoid an overlap. Here there was nothing in the terms of either of the collective agreements which would have enhanced the seniority claims of the Donline employees at Softley. Rather, what language was relevant clearly supported the *Softley* employees on the seniority issue.

17. Reviewing the respondents' conduct in the context of section 68 of the Act, the Board has noted in *Dufferin Aggregates*, [1981] OLRB Rep. Jan. 35:

21. There is nothing inherently unlawful in a union making a decision that favours one group of employees over another.

Indeed, as that decision notes, unions are required to do that all the time. This becomes particularly evident where, as here, one company goes out of business and another company acquires its assets, and the interests of the respective groups of employees are pitted squarely against each other. In the present case, the unions in fact had very little decision to make. Local 938 did its best to negotiate an equitable amount of protection for the Donline people, and Local 879, to its credit, was prepared to take the political heat in justifying that arrangement to its own members. But no Softley employee could have its rights altered under the collective agreement without the company's consent, and the company was not prepared to let that happen. There was simply no viable legal avenue available for either respondent to pursue.

18. The complainants argue that their bargaining agent should have taken the "neutral" step of putting the matter before some third party for determination anyway. But that would not have been a "neutral" step. The Teamsters were the bargaining agents for the Softley employees as well, and the company was taking the position that no basis existed for the dovetailing of Donline employees. The only way that the issue could come before a third party was for the trade unions to advocate a position that was contrary to the company's. This would mean taking a position which favoured Donline employees over Softley employees. Given the patent legal justification for the position of the Softley employees under their contract, and the unlikelihood therefore of any success for Donline employees to come out of such a confrontation, the respondents were not prepared to pursue such a course.

19. A similar situation arises for a trade union every time it is faced with a grievance over, e.g., job posting. In *William Almas*, Board File No. 1059-80-U, released November 19, 1980, the Hospital employer had awarded a promotion to Mr. Almas, and a more senior man grieved. On the facts, the Union supported the senior man's position, and persuaded the Hospital to change its award. Mr. Almas then grieved. The Union, of course, declined to pursue Mr. Almas' grievance, and Mr. Almas came to the Labour Board. He argued that the union was not entitled to "settle" the other man's grievance; that the only "fair" thing to do was to let a third party decide. The Board noted:

7. ... By settling rather than proceeding to arbitration with either his or Mr. Barker's grievance, the complainant argues, the respondent prevented the matter in dispute from being determined once and for all.

8. The misconception underlying this argument is the assumption that the final determination of an issue can only be achieved by third-party arbitration. But while this might be a politically "safer" approach for a union to adopt in certain circumstances, a union owes it to its members to turn its mind to the merits of a particular grievance, as it did here, and to attempt to achieve a "final determination" by way of a proper and freely-negotiated settlement with the employer. Only in this way can the greater proportion of disputes under a collective agreement be resolved short of the more expensive and time-consuming process of arbitration, and credibility with the employer be maintained. As was pointed out in the seminal case of *Vaca v. Sipes*, (1967) 386 U.S. 1971, the model for the statutory provision now contained in our own Act: "In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavour in good faith to settle grievances short of arbitration".

9. Here, as with seniority grievances generally, the dispute included the competing interests of two employees in the bargaining unit. Obviously the respondent could not support both. The grieving employee, for the reasons cited above, has no absolute right to have the matter proceed to arbitration for determination (even though a settlement may be contrary to his interest: see *Nick Bachiu*, [1975] OLRB Rep. Dec. 919, at paragraph 12) and clearly the employee who is competing in interest has no right to veto a settlement either. If it were otherwise, a trade union would be likely to have the settlement of a seniority grievance vetoed by one or the other of the competing employees no matter what it proposed. The duty of fair representation in this situation requires the respondent to honestly turn its mind to the provisions of the collective agreement and the evidence available, and to press for the resolution which it objectively feels is in accordance with the collective agreement (see e.g., the *E. B. Eddy* case, [1977] OLRB Rep. Nov. 762, at paragraph 19). This the respondent did. See also *Rowntree-MacIntosh*, [1977] OLRB Rep. April 211, for a case similar to the present.

20. In *Dufferin Aggregates*, *supra*, the Board further defined the limitations on its own

role in reviewing the decisions of a trade union when faced with conflicting interest among its members:

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in condition of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it — rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

21. Given the countervailing interests of the Softley employees, the extent to which the Softley employees were already insisting on the protection of those interests, the resistance of the company to even the limited compromising of those rights which the respondents had themselves proposed, and, most importantly, the absolute lack of any viable legal ground to support the claims of the complainants, it is impossible for the Board to conclude that the respondents did not meet the standard articulated above in passively accepting the company's decision to operate Donline on a separate seniority basis through Rideau. As the Board pointed out in *Dufferin Aggregates*, seniority rights expressly set forth in the collective agreement are in the nature of "vested" rights, and in the context of the duty of fair representation, are not lightly interfered with. In the present case, it was the *Softley* employees who enjoyed these contractual rights, and it must be borne in mind that the respondents were required to meet the demands of section 68 with respect to that group of employees as well. The Board does not find the respondents' decision not to "take on" the company, in all the circumstances, to constitute a violation of section 68 of the Act.

22. The witnesses who testified for the respondent lacked neither experience nor intelligence, and the Board considers it highly unlikely that they did not perceive that the Rideau arrangement offered little or no protection to the former Donline employees, particularly once the remaining three Donline contracts had expired. Rather, they appear to have concluded that the fate of the former Donline employees did in fact lie in the hands of the company, and that they had nothing more promising to rely upon than the good faith of the company itself. This was a conclusion which the respondents arrived at after a consideration of the relevant factors, and, as indicated, is not one which could objectively be characterized as unreasonable. As the parties moved farther away from the time of the sale, the respondents may have had some cause on the information presented to them to question whether such good faith was being demonstrated towards the Donline employees. But they still had no legal ground on which to mount a challenge, and as less and less of the ongoing work became attributable to exclusively Donline Customers, the original basis for compromising the legal



rights of Softley employees was diminished. The Board cannot, in the circumstances, find the respondents' continued acceptance of the *status quo* to be in violation of section 68.

23. Neither does the Board find that it was essential in this case for the respondents to have asked the employees involved for direction, as counsel for the complainants argues, prior to initially formulating their own position. To be a fair process, *both* groups of employees would have had to have been consulted, and it was not a difficult feat, in the circumstances, to surmise what the wishes of the respective groups would have been. Given the inevitable conflict, this was the kind of decision that the respondents ultimately had to take the responsibility for themselves. Once having ascertained, on the relevant factors, the respective rights of the two groups, it was up to the respondents whether to seek consultation or not. The Board is satisfied that in failing to consult in this case, the respondents did not deprive themselves of access to any relevant factors which may have affected their determination. For the same reasons, the Board does not find the suggestion that the result ought to have been "ratified" by the employees to be tenable either. The respondents in that event would have been faced with the same dilemma of competing interests, and, as noted in the *Dufferin Aggregates* case, *supra*, would not have been entitled to simply rely on "majority rule" to justify its action. This case must be carefully distinguished from the *Clifford Renaud* decision, [1976] OLRB Rep. Jan. 967, where the Board simply noted that if the trade union was relying upon the ratification of its action at an employee meeting, it must be prepared as a starting point to demonstrate that adequate notice of such meeting was given to the employees affected. The Board would note as well that the efforts of the respondents to find work elsewhere for the former Donline employees, also a source of complaint, do not relate to the representation of these employees "in a bargaining unit", and cannot in and of itself support a violation of the duty contained in section 68 (no issue under section 69, the "referral" section, arises in these proceedings).

24. The Board has, however, to this point set out the facts only as they relate to the perspective of the respondent trade unions. The complainants, however, had a different perspective. They were privy to the matters transpiring between the company and the respondents, and to the respondents' process of decision-making, only to the extent that the respondents took the steps to communicate such. And it is only in this aspect of the case that the respondents have opened themselves to criticism.

25. That aspect of the situation in fact appears to have been inadequately handled by the respondents from the start. After Donline was shut down in December, a question appears to have arisen as to which Local Union was actually the bargaining agent for these former Donline employees. Many of them were on "withdrawal" from 938, being on layoff, and had not yet been recalled into the Milton bargaining unit which 879 represented. They began, naturally, by calling the respondent Local 938, and specifically Jim White, who had always been their business agent at Donline. Mr. White was able to offer very little to these employees by way of answers, and appears to have been unduly influenced by the fact that certain of the employees had expressed to him their interest in receiving severance pay. Mr. White in fact took Mr. Silver, a spokesman for the complainants with whom Mr. White had numerous telephone conversations, down to the Employment Standards Branch at one point, and was "surprised" to learn that the bulk of the employees were interested not in severance pay, but in getting their jobs back. Mr. White shortly thereafter advised Mr. Silver, and others, that they were now the concern of Local 879. When these employees telephoned Local 879, and advised of White's direction, they were told by the business agent there, Mr. Schultz, that it was a

matter for Local 1938. They reported this back to White at 938, only to be rebuffed again. It is not clear from the evidence how long this went on, but it appears that it may have been for at least the better part of a month, with employees being bounced back and forth between Locals as much as five or six times. When Schultz finally did accept the out-of-work Donline employees as 879's responsibility, he engaged in a verbal joust with Mr. Silver which only added to the complainants' sense of alienation. On the evidence the Board is satisfied that Mr. Silver told Mr. Schultz he recognized the position Mr. Schultz was in, having the Softley employees on his back as well, but that Mr. Silver and the other Donline employees had no alternative but to fight for their jobs. Mention had already been made of the complainants going to the Labour Board. Mr. Schultz told Mr. Silver they could go "wherever the hell they wanted", but that he would fight them all the way — that there was no way they were coming into the seniority list. It would appear that the only explanation which Mr. Schultz gave for his position in that call or any other calls was that the complainants were not Softley employees, and that they would be recalled into Rideau as work became available, in accordance with their Donline seniority.

26. The evidence establishes that many, many calls and visits were made by the complainants to the offices of the two respondents from December 1980 to April or May of 1981, trying to ascertain from the respondents what was happening and why. Mr. Thibault, the President of local 938, was aware of these calls, but thought that the business agent, Jim White, was handling the situation. He also indicated that since the work was now in the Local 879 jurisdictional area, he felt he had fulfilled his responsibility to the men by having Jim White put them in touch with 879. Mr. Contardi, the President of 879, also was aware of the abundant phone calls to Mr. Schultz, but he too believed that the business agent was on top of it. He acknowledged on cross-examination that "maybe we were wrong, maybe we should have called meeting", but felt from all of the telephone contact with Len Schultz that the men must have been adequately informed. Mr. Schultz, for his part, together with Mr. White, indicated he believed the steward (Bill Woods) would be keeping the men informed. The evidence of the complainants is that they were getting nothing from Mr. Woods. They testified further that he was a weak steward and they had no confidence in him, and were only dealing with him as a formal step in getting matters before the respondents. Mr. Schultz denies ever refusing to attend a meeting with Donline employees and Local 938, but the Board finds on the evidence that he was in fact asked to do so by at least one of the complainants, and said he had nothing to say to them. Mr. Schultz testified that the employees were "automatically" told what their rights were when he advised them that the company was operating two separate companies and two seniority boards, and that they had no right to be on the Softley board. He testified further that he did not feel that he was responsible for any of the Donline employees until they actually began working in his jurisdiction, other than to ensure that recall was by seniority, and the collective agreement rate was paid.

27. Care must be taken here to distinguish from the evidence what the complainants were in fact told by the respondents, was opposed to what it was they really wanted to hear. With respect to Rideau, for example, the complainants generally admitted to far less awareness of that company in their evidence-in-chief than they were able to sustain in cross-examination. Yet being advised that they were "Rideau" employees, and would be recalled to "Rideau" if and when that company had work for them, hardly provided a response to the employees' legitimate question. To tell them simply that they were "Rideau" employees, and not "Softley" employees, was merely to confirm to them that they were losing their jobs. They already knew that. What these employees wanted to know from their Union was how, in the

face of the earlier indications and subsequent intermingling with Softley employees, they had ceased to be employees of "Softley" and were suddenly employees of "Rideau". They wanted to know why men junior to them in service were still working at Softley, while they themselves were on the street. They wanted to know what efforts their Union had made on their behalf, and why it could not do more.

28. The peculiar feature of this case is that the respondents *had* the answers to all of those question. As the Board outlined earlier, the respondents had done all that the duty of fair representation required of them, and more. They had not only turned their minds fully (and correctly) to what were the respective legal positions of the two groups of employees and of the employer, but had attempted to negotiate for Donline employees a measure of seniority protection which went beyond that. They knew, from their extensive discussions with the company, how and why "Rideau" came into the picture, and the impact that that was to have on the situation at hand. They knew that the provisions of the Donline agreement upon which the group of employees were relying did not assist them, and that the collective agreements in fact unequivocally supported the position being taken by Softley itself. They knew that the Labour Relations Act provided no recourse to the Board to change that. Yet, on the evidence, the Board finds that none of these explanations were provided to the employees who were legitimately seeking them. What is the effect of that?

29. In considering that question, the Board would note that a failure by a trade union to meet reasonable standards of communication with aggrieved employees that it represents, at least in terms of the *efforts* that it makes, can operate to the trade union's prejudice in a number of significant ways. A failure to consult may, in the first place, cut the trade union off from relevant facts or questions which it is the trade union's duty to consider in order to meet the non-"arbitrary" standard of the duty of fair representation. Or the mere unwillingness or lack of effort to communicate, if unreasonable, may in itself point in the direction of conduct which is arbitrary, discriminatory or in bad faith, and cause the Board to view with particular attention the actual level of representation afforded by the trade union. And short, even, of these possibilities, such conduct on the part of a trade union may involve it in lengthy and expensive proceedings before the Board which, through just a little more care in communicating, could conceivably have been avoided. Mr. Silver, a complainant in the present case, for example, testified: "We're not stupid. If we'd have been given a reasonable explanation, we probably would have walked away. But after a while, it began to look dirty — up till then we believed in these people [the Teamsters]...". Whether or not the complainants would have walked away, we'll never know. But at the very least, a simple account of the steps by which the respondents had acted would have permitted the present complainants a more realistic basis to assess with counsel their own chances of success, prior to litigating this matter before the Board.

30. That, however, is as far as the respondent's omissions take us in the present case. The respondents did in fact represent the complainants vis-a-vis their employer as fully as section 68 could require, and the Board has found as a fact that no information or assistance could have been gleaned from consultation with the complainants which would reasonably have altered the result in this particular case. There has been, accordingly, no violation of the statute on the part of the respondents, and the complainants are not entitled to any relief.

31. Counsel for the complainants argues, nonetheless, that the complainants should be awarded their costs of this action, as a form of damages, in light of the explanations which the



respondents could have given but failed to give to the complainants short of litigation. Counsel relies on the Board's recent decision in *Suzanne Hebert-Vaillant*, [1981] OLRB Rep. June 623, in support of this request for costs/damages. That case, however, stands very much on its own facts, and in any event, did *not* award costs in any form with respect to the section 68 proceeding itself. While the Board has already indicated its view of the respondents' conduct from the point of view of communications with the complainants, that conduct, for the reasons given, does not in itself establish a violation of the Act. Neither does the Board find in this case sufficiently overriding considerations to depart from its normal policy of not awarding costs (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220), particularly since the complainants' action has, when all is said and done, proven to be unsuccessful.

32. The Board finds that this application must be dismissed, and does so.

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**1496-80-U; 1501-80-U Tecumseth Insulation Services Ltd., and Christian Labour Association of Canada, Complainant/Applicants, v. Toronto Building and Construction Trades Council, International Brotherhood of Electrical Workers, Local 353, International Union of Operating Engineers, Hoisting Division, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Labourers International Union, Local 506, Carpenters District Council of Toronto and Vicinity affiliated with United Brotherhood of Carpenters and Joiners of America, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, and nineteen named individuals, Respondents, v. The Master Insulators' Association of Ontario, Incorporated, Intervener**

**Construction Industry – Strike – Practice and Procedure – Cease and desist order sought against alleged unlawful picket lines – Whether prima facie case made out – Discretion not to make declaration where unlawful activity ended considered only after hearing merits – Complaints having status as persons affected**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *William S. Challis, Ernest Belanger, Susan Collins, O. V. Gray, Ed Vanderkloet and John Adema for the complainants/applicants; B. Fishbein, G. Whyte, J. D. Johnson, B. McQueen and B. W. Adams for the respondents; no one for the intervener.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; May 28, 1982**

1. The Christian Labour Association of Canada is hereby added as a complainant/applicant in these proceedings.

2. These are consolidated matters involving an application for a cease and desist order under section 135 of the *Labour Relations Act*, and a complaint under section 89 of the Act seeking damages and other forms of relief, including widespread dissemination of an official notice of the results of these proceedings. The complainant Tecumseth is an employer of members of the complainant Christian Labour Association of Canada. The complainants in essence allege that the respondents by closing down job sites at which the complainant Tecumseth is engaged, through unlawful picketing or other means, are engaged in a concerted effort to put Tecumseth out of business, or at least to prevent it from operating with members of the complainant Christian Labour Association of Canada as its employees. The matters were filed in September and October respectively, of 1980, but were then made the subject of unsuccessful section 1(4) proceedings at the instance of the respondents.

3. The Board then on April 5, 1982, heard argument on the motions of the respondents to strike out all or part of the complainants' claims on the basis that they did not make out a *prima facie* case for the remedy sought.

4. The Board notified the parties by telex through the Registrar on April 8, 1982, that the respondents' motions were dismissed (Board member Kobryn dissenting). The Board was prepared at the continuation of hearing on April 13, 1982, to deliver brief oral reasons for its decision to dismiss. The Board was advised at the hearing, however, that counsel for the respondents had suddenly taken ill, and that all parties were agreed to an adjournment on terms not here relevant. The Board in the circumstances decided not to issue its reasons orally, but rather to do so in writing prior to the resumption of hearings. Those reasons are as follows.

5. The respondents' main ground for seeking dismissal of the proceedings was that no picketing, strike or other activity of the kind complained of has been alleged since, at the latest, December of 1980. The respondents relied upon the Board's practice of not granting a declaration or direction, except in certain defined circumstances, where the unlawful conduct complained of has ceased by the time of the hearing. The respondents argued further that the complainant cannot "revive" the proceedings simply by adding a claim for damages.

6. As the respondents point out, the Board in most situations has declined to issue a declaration or direction in connection with an unlawful strike where, by the time of the hearing, the conduct complained of has ceased. As in *Acoustical Association of Ontario*, [1975] OLRB Rep. July 539, e.g., at paragraphs 7 and 8:

7. Given the function to be performed by the declaration, the Board has been reluctant to grant a declaration where a strike has been settled before the hearing of the application. . .

8. There are some situations, however, where a declaration will be granted even though the strike is settled. Circumstances such as a past pattern of unlawful strikes or a reasonable likelihood that strike activity will recur have overridden the Board's reluctance to intervene once a strike is settled. Recently, in *Norfolk Hospital Association*, *supra*, the Board has added another exception, that is where the conduct in question has implications that extend beyond the immediate bargaining parties. In this type of situation, the declaration serves not only to warn the immediate parties but also to warn others in similar bargaining situations.

There are sound labour-relations reasons underlying this policy of demurrer, as articulated, for example, in *Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581, at paragraph 23:

It has often been stated that a declaration is not meant to be punitive, but rather, is intended primarily as an aid to the settlement of labour disputes; a device, in short, to encourage resolution of the differences and the return to lawful courses of conduct. The Board must be cautious that its intervention, by way of declaration, will play some constructive role, rather than disrupt a relationship which, by the time of the hearing, has stabilized....

See also *Acoustical Association of Ontario*, *supra*, at paragraph 7, where the Board elaborated as follows:

The reasons for this approach are fully explained in both *Beatty Bros.* (1965), 66 CLLC ¶ 16,049 and *National Refractories* (1963), 63 CLLC ¶ 16,276. The general thrust of these reasons is that, once the strike has disappeared, then, as a general rule, no useful purpose can be served by a determination of the legality of the activity. In other words, the declaration has been regarded as a procedure for preventing the continuation of strikes, and not as a procedure for a retrospective assessment of the legal position of one of the bargaining parties. To take this latter approach would create the danger that intervention by the Board might upset the settlement already reached...

7. An analysis of the Board's cases dealing with this principle confirms that they generally rest upon the Board's conclusion that the issue underlying the unlawful conduct has been either settled or dissolved, or at least defused to the point where *lawful* means of resolution, such as a grievance procedure, are being resorted to, and hence no reasonable apprehension of recurring unlawful conduct can be sustained. See, for example, *General Contractors of Toronto Builders' Exchange*, 59 CLLC ¶ 18,151; *Major Masonry and Construction Limited*, [1963] OLRB Rep. Sept. 319; *Hydro-Electric Power Commission of Ontario*, [1965] OLRB Rep. Dec. 645; *Bechtel Canada Ltd.*, [1977] Rep. May 269, at paragraph 23. And, as can be seen, where the unlawful conduct has ceased, the Board has weighed as well the benefit to be derived from the litigation and remedial order arising from the application before the Board, against the possibly detrimental effect that such might have on a continuing and apparently stabilized bargaining relationship. In the present case, neither of these circumstances exist, and the Board can see no overriding labour-relations purpose for deciding prior to hearing the evidence how its discretion may appropriately be exercised, or for declining to entertain the application.

8. Dealing more generally with the issue of remedy, the Board is not satisfied at this stage that any of the relief sought by Tecumseth is, as argued by the respondents, beyond the Board's jurisdiction. Again, the Board finds no labour-relations purpose in this case to be served by limiting in advance its consideration of what an appropriate remedy might be.

9. The respondents argue in any event that paragraph (e) of Schedule C of the complaints should be struck on the ground that it seeks to assert the rights of others. That paragraph refers to intimidating or coercing employees of other subcontractors on the complainants' job sites to engage in unlawful strikes, in contravention of section 72 of the Act. (The



respondents do not challenge the right of the complainants to attack the alleged picket-line activity designed to achieve the same result.) That section provides:

72.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee. . .

In the Board's view, insofar as the complaint seeks an order restraining the respondents from seeking by any means, be it picket-lines or otherwise, to cause employees to engage in an unlawful strike, it alleges at the very least a violation of what are now sections 74 and 76 of the Act, which provide:

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

The complainants are, in this case, clearly persons affected by such action, and thus having status to complain under those sections. Assuming, as one must on this type of motion, that the allegations of the complainants are true, the complainants are in fact the sole objects of this unlawful conduct in which the respondents are engaging.

9. With respect to the respondent's request for further clarification and particularization of the employer's damage claims, the Board finds nothing in this case to cause it to depart from its normal practice of remaining seized with the damage issue and dealing with it if necessary after the question of liability has been determined. At that point further specificity may well be directed or encouraged in order to permit the respondents a fair opportunity to prepare their response. Whether or not a causal connection between the respondents' acts and any losses claimed can ultimately be established is, of course, the problem of the complainants. The issue of liability must first, however, be determined, and that will be done solely on the basis of improper conduct properly particularized before the Board. With respect to the allegation recently filed by Tecumseth involving Mr. Smails in December of 1980, the Board sees no overriding prejudice to the respondents, in view of the notice they now have, in permitting the complainants to adduce their evidence on that allegation. Whether that evidence is in fact sufficient to implicate the respondents herein remains to be seen.

10. The matter will continue on the dates already set.

11. The decision of Board Member H. Kobryn will follow at a later date.

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**2261-81-R** International Molders & Allied Workers Union, Applicant,  
v. **Washington Mills Limited**, Respondent, v. Group of Employees,  
Objectors

Certification – Petition – Union supporter called into company president's office day after union meeting – Assigned to work weekends – Pay day changed from Wednesday to Thursday – Employer meeting with union opponents during work hours – Announcing benefits and improvements in working conditions – Whether Board accepting petition as voluntary in circumstances

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members C. G. Bourne and C. A. Ballentine.

**APPEARANCES:** *H. Goldblatt and G. Plancke for the applicant; Jane Forbes-Roberts, Ralph Powell and Henry Horner for the respondent; G. F. McNab for the group of employees.*

**DECISION OF VICE-CHAIRMAN IAN SPRINGATE AND BOARD MEMBER C. A. BALLENTINE;** May 25, 1982

1. This an application for certification.

• • •

3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties are in disagreement as to whether or not “technical staff” should be excluded from the bargaining unit. There is only one person who might fit within this classification, namely Ms. Maureen McCrea. The parties are unable to reach agreement concerning her duties and responsibilities. In these circumstances, a Board Officer is appointed to inquire into, and report back to the Board, on the duties and responsibilities of Ms. McCrea.

5. Apart from the matter of the proposed exclusion of technical staff, the parties are in agreement that the bargaining unit should be described in terms of all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.

6. Depending on the determination as to the status of Ms. McCrea, on the date of the filing of the application these were either 25 or 26 employees in the bargaining unit. The applicant filed evidence of membership on behalf of 19 of these persons. The evidence of membership consists of applications for membership, with attached receipts indicating a payment of \$1.00 to the union. This evidence of membership is supported by a duly completed Form 9, Declaration Concerning Membership Documents. Having regard to this material, and to the definition of a “member” of a trade union set out in section 1(1)(l) of the Act, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 8, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. There was also filed with the Board a statement of desire in opposition to the application signed by 23 of the respondent's employees. Statements of desire are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment (in the nature of consideration confirming the act of signing), or a declaration of regularity similar to Form 9. Nevertheless, the existence of statements of desire appears to be contemplated by both section 103(1)(j) of the Act and Rule 48 of the Rules of Practice; and in any event, the Board has a long established practice of accepting statements of desire and exercising its discretion under section 7(2) of the Act to order a representation vote where: the statements are voluntary, there is evidence given in accordance with Rule 48, and the statements contain the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification.

8. In the instant case, 18 of the 23 employees who signed the statement of desire in opposition to the application, had previously signed union membership cards indicating that they supported the union's certification. If we were satisfied that the union members who signed statements of desire did so voluntarily, we would have before us two contradictory pieces of documentary evidence concerning the employees' wishes and would, in accordance with the Board's usual practice, exercise our discretion under section 7(2) of the act and direct the taking of a representation vote to resolve the issue.

9. Before the Board will direct the taking of a representation vote on the basis of an employee statement of desire, it must be satisfied that when union members signed the statement of desire evidencing an apparent change of heart, they did so voluntarily and were not motivated by a concern that their failure to sign would be communicated to their employer or could result in reprisals. The Board's concerns in this regard were expressed as follows in the *Radio Shack* case [1978] OLRB Rep. Nov. 1043:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶ 16,264 the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free



exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the workplace in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)"

10. On Tuesday, January 26, 1982 a majority of the respondent's employees attended a meeting called by the applicant trade union. It is clear that at least one of the respondent's foremen was aware of the meeting prior to it being held. During the union meeting, Mr. Robert Lloyd, one of the employees who later was to become actively involved with the statement of desire, proposed that instead of joining the union, the employees form a committee for the purpose of dealing with the respondent. At the hearing, Mr. Lloyd acknowledged that at the time he originally made this proposal it did not receive the support of any of the other employees.

11. One of the employees active in signing employees into union membership was Mr. Keith Hammond, an electrician. Mr. Hammond, as well as Mr. Dale Lovell, an electricians' apprentice, had been the ones who informed employees of the union meeting. On January 27, 1982, the day after the union meeting, Mr. Hammond was called into the office of Mr. Ralph Powell, the respondent's president. This was the first time that Mr. Hammond had met with Mr. Powell. Mr. Powell did not refer to the union during the meeting, but did ask about any problems which Mr. Hammond might be having. In response Mr. Hammond referred to the need to carry a pager when he was "on call" on the weekends. On the same day, it was announced that the schedule for electricians was being altered. Mr. Hammond had previously worked Monday to Friday while also being on call every second weekend. As of January 27th, Mr. Hammond's schedule was altered so that thereafter he worked Monday, Tuesday, Wednesday, Saturday and Sunday. According to Mr. Hammond, another electrician, Mr. G. Meehan, was also assigned "this type" of shift. It was the contention of counsel for the respondent that the shift changes were required due to an increase in production. The evidence on this point, however, was limited to Mr. Hammond's response to questions put to him by the respondent's counsel. Mr. Hammond testified that while there had been an increase in production, as far as he was aware the increase had been minimal.

12. Prior to the union meeting, employees received their pay cheques on Wednesday. The evidence led before us indicates that although at times the cheques were dated for the Wednesday, generally they were dated for the following day, Thursday. Notwithstanding the fact that the cheques were generally dated for Thursday, the evidence is that banks would cash the cheques after 3:00 p.m. on Wednesday. On January 27, 1982, the day after the union meeting, the respondent indicated that henceforth all cheques would be issued on Thursday. No reason was advanced to explain this change, either at the time the change was announced or at the Board hearing.

13. As indicated above, at the union meeting Mr. Robert Lloyd proposed that instead of joining the union the employees form a committee, but that this proposal had not met with any support. On the morning of Thursday, January 28, 1982, Mr. Lloyd went to see Mr. L. Lauzon, the respondent's plant manager and Mr. A. Hare, the plant superintendent. According to Mr. Lloyd, these gentlemen were already aware of the union meeting. Mr. Lloyd told Mr. Lauzon and Mr. Hare that he would like to get a committee going and to have the committee meet with management, including Mr. Powell, the respondent's president, to "get problems out". The meeting was agreed to, and arranged for Monday, February 1, 1982.

14. Mr. Lloyd testified that although he had worked the preceding night shift, on the morning of January 28th he stayed at work to discuss a committee with a number of employees, some of whom were at their work stations at the time. It is not clear from the evidence whether this discussion was before or after Mr. Lloyd's meeting with management. It is clear that subsequent to his meeting with management, Mr. Lloyd advised the employees that they should select representatives to meet with management about their concerns.

15. On either Thursday, January 28th or Friday, January 29th, Mr. Ron Taylor, one of the respondent's employees went to see Mr. Robert Thiel about the trade union. It appears that Mr. Thiel holds no formal position with the respondent. However, Mr. Thiel was described as a contractor who built the respondent's plant and who still does work for the respondent. Mr. Lloyd testified that Mr. Thiel had hired most of the respondent's employees. The evidence does not indicate whether Mr. Thiel had hired the employees on behalf of the respondent, or whether he originally hired them to work for him while he was building the plant and they were subsequently "taken-over" by the respondent to operate the plant.

16. A few days after their original meeting, Mr. Taylor returned to see Mr. Thiel, this time accompanied by Mr. Lloyd and Mr. Dale Lovell. There is some conflict in the evidence concerning just when it was that they went to see Mr. Thiel, but the most likely date appears to have been Sunday, January 31, 1982. Mr. Taylor, Mr. Lloyd and Mr. Lovell discussed with Mr. Thiel the wording to be used on a statement of desire. Mr. Lovell testified that everyone in the plant knew that Mr. Thiel had been consulted about the statement of desire.

17. The meeting between the employee representatives and management took place at 3:00 p.m. during working hours, on February 1st. At least two of the employees who attended the meeting stopped work prior to 3:00 p.m. to wash-up. Employees attending at the meeting included Mr. Taylor, Mr. Lloyd, Mr. Lovell and Mr. J. Gibson. Among those attending on behalf of management were Mr. Powell, Mr. Lauzon and Mr. Hare. Also in attendance at the meeting was Mr. Thiel who had been invited by both Mr. Taylor and Mr. Lloyd. Mr. Thiel did not speak at the meeting.

18. During the course of the meeting, the employees raised a number of concerns. The evidence indicates that these concerns had not previously been discussed directly with senior management, although some employees had raised certain of the same concerns with their foremen, but without any response. Near the commencement of the meeting, management indicated that it could make no promises, and with the exception of an undertaking to correct certain safety problems, during the meeting no promises were made. The union was not referred to during the meeting.

19. On February 4, 1982, the respondent posted the following notice to employees:

“Memo To: All Employees  
Memo From: Ralph Powell

Further to our meeting with the employees group, the following items of their concern are receiving our immediate attention.

1. *First Aid Stations* have been increased to 4 locations and each first aid kit will be filled and supplies reviewed weekly.

Locations:

- 1) general office
- 2) control room
- 3) foremen's office
- 4) maintenance shop

2. *The crane* has been under review for the last 5 months and we have discussed the crane up-grading with other crane manufacturers to correct the known problems that exist.
3. *Dust Masks* — all employees will be issued with the same heavy-duty mask effective immediately. The masks are available on request from your foreman.
4. *Utility Cupboards* — construction will start immediately which will provide 4 utility cupboards for each shifts set of tools. It will be the responsibility for each shift to maintain their own cupboard and keys.
5. *Coveralls* — Work Wear Corporation of Canada have been contacted regarding coveralls for *all employees*. Each shift foreman will be responsible for distribution. The coveralls should be available within 10 days.
6. *Repair Request Sheets* — The supply of sheets will be the responsibility of Alan Hare and when a repair is requested, please complete the form so that immediate action can be taken.
7. *Deep Tap Care Repairs* — repairs will be started immediately to correct the problems.



8. *Pot Cars* — Care wheels are being changed to correct the binding problem.
9. *Profit Sharing Plan* — A simple descriptive brochure explaining all the benefits to you and your family will be mailed to you by February 15, 1982.
10. *Vacations* — Vacation schedules will be posted and adhered to with seniority, the basis for settlement of any duplications.
11. *Change Rooms* — An outside contractor will be hired initially to maintain the washrooms, lunch room and shower area. The hot water and ventilation problems are being investigated.
12. *Safety Committee* — See memo, February 4, 1982.
13. *Accident Procedure* — A formal procedure is being developed whereby any of Washington Mills Limited employees will receive the most efficient and best treatment available for any accident on company property. This procedure will be reviewed with the safety committee to be appointed by the employees.
14. *Propane Torch* — A specific location for the torch and tanks will be selected with the shift supervisor responsible to see that the torch and tank are in place at the end of every shift.

All the other areas of concern that were discussed at the meeting are being followed up and these will be reported back to you when completed."

20. The statement of desire was circulated by Mr. Taylor, Mr. Lovell, Mr. Gibson and Mr. Lloyd, all of whom had attended the meeting with management. All four of these individuals testified before the Board. There was considerable uncertainty among the four as to just when it was that the statement was circulated. The weight of the evidence, however, suggests that it started to be circulated on Tuesday, February 2, 1982, that is the day after the meeting with management, and that the last signatures were obtained on Thursday, February 4th after the posting of the memo from Mr. Powell. Most of the signatures were obtained on the statement of desire on the respondent's premises during working hours. However, it appears that no one signed the document in the presence of managerial staff.

21. One further issue was raised with respect to the voluntariness of the statement of desire. This involved an alleged statement made at the union meeting held on January 26, 1982. No particulars of misconduct were filed with respect to the alleged statement, and counsel for the objectors indicated that the statement was being put before the Board only insofar as it related to why employees might have signed a union card and later signed the statement of desire. Counsel stressed that the matter was not being raised with the intent to challenge the validity of the union's membership evidence. Mr. Gibson, one of the employees who circulated the statement of desire, testified that at the meeting it was stated that he could pay one dollar now, or if he later decided to sign a union card he would have to pay four hundred dollars. Mr. Gibson testified that he did not want to be part of the union, but that he signed a card since he

did not want to pay four hundred dollars for something that he did not like. Mr. Gibson noted, however, that he had left the meeting without having signed a card, so presumably he signed sometime later. Mr. Lloyd testified that at the meeting he was told that he could pay one dollar now or three hundred dollars later.

22. Mr. Hammond gave detailed testimony about what was actually said at the union meeting, testimony which we accept as being accurate. During the meeting, while employees were signing cards, and indeed after most of those present had signed, the question was raised as to what the union's initiation fees would be. In response to this question, Mr. G. Plancke, a staff representative of the union, indicated that if the union was certified, a local would be established for the employees of the respondent, and that it would be up to the local's members to set any initiation fee they wanted, that they could charge \$300.00, but that again it would be up to the Washington Mills local to decide. In our view, given the nature of Mr. Plancke's comment, the lack of any direct or implied threat to employee job security in the comment, as well as Mr. Plancke's statement that the matter would be decided by the Washington Mills employees, we do not believe that reasonable employees would have either felt coerced into signing a union card or somehow influenced into first signing for and then against the union's certification.

23. In assessing the voluntariness of the statement of desire, we do view as important the fact that the day after the union meeting, the respondent's president called into his office a leading union supporter and on the same day this union supporter was assigned to work weekends. We also view with some concern the change of days on which pay cheques are distributed. Even if the change in Mr. Hammond's shift was motivated by valid business considerations, because of the timing involved, employees would likely have viewed the change as being connected with his active support for the union. The changing of the days on which pay cheques are handed out would likely have been viewed by the employees as indicative of the respondent's displeasure with their attendance at the union meeting while at the same time impressing on them the respondent's ability to alter employment conditions to their detriment. Given the lack of any explanation of the purpose behind the change in days, we must presume that this result was what the respondent intended to achieve.

24. The respondent's action in meeting with a committee of employees during working hours would also have likely been viewed as a management response to the union. In this regard it is to be remembered that Mr. Lloyd, the employee who advised other employees about the committee and arranged for the meeting with management, had at the union meeting proposed that instead of joining the union the employees form a committee to deal with management. As a result of the meeting with the committee on February 4, 1982, Mr. Powell issued a memo which indicated that management was taking steps to correct a number of employee complaints. The announcement of improvements by management in response to a union organizing campaign is a matter of some concern due to the possible inference that these and any future improvements are conditional on the employees rejecting the union. In *N.L.R.B. v Exchange Parts Co.* (1964), 375 U.S. 405, the U.S. Supreme Court expressed this concern as follows:

"The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

The danger may be diminished, if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable."

25. The cumulative effect on the employees of the improvements announced by the company, the changes to Mr. Hammond's shift and the alteration of the day on which pay cheques are distributed, would alone make us concerned about accepting the statement of desire as a voluntary expression of the employees. However, when both the role of Mr. Thiel and the identity of those who circulated the statement are also taken into account, we have no hesitation in concluding that we cannot be satisfied that the statement of desire represents the voluntary wishes of the employees who signed it. Mr. Lovell testified that all of the employees knew that Mr. Thiel had been consulted about the statement of desire. Although, Mr. Thiel apparently had no official role with the respondent, because of his role in building the plant and hiring most of the employees, he would have reasonably be viewed as having a direct connection with management, a view which would have been reinforced by his presence at the meeting of employees with management of February 1, 1982. Because of Mr. Thiel's involvement with the statement of desire, coupled with the fact that the employees circulating the statement were members of the committee who attended at the meeting with management, employees might reasonably have signed the document out of a concern that management supported the statement and might become aware as to which employees had refused to sign it.

26. In all of these circumstances, we decline to exercise our discretion to direct the taking of a representation vote. The respondent is accordingly in a certifiable position. In these circumstances, pursuant to the Board's authority under section 6(2) of the Act, and pending a final resolution of the composition of the bargaining unit, we hereby certify the applicant as the bargaining agent for all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office and sales staff, technical staff, and students employed during the school vacation period. For the purposes of clarity, we note that until her status is finally determined Ms. McCrea is excluded from the bargaining unit.

27. The decision of Board Member C. G. Bourne will be forthcoming at a later date.

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**2526-81-R** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Applicant, v. Windsor Machine & Stamping Limited, Respondent, v. Group of Employees, Objectors

Pre-Hearing Vote – Representation Vote – Known opponents of union not invited to attend organizational meetings – Union not obliged to invite every employee – Union official's presence near polling area not affecting vote – Board declining to direct new vote

**BEFORE:** R.D. Howe, Vice-Chairman, and Board Members J.D. Bell and H. Kobryn.

*APPEARANCES:* H. Carl Anderson and Ken Simpson for the applicant; George W. King for the respondent; D. Stephen Jovanovic for the objectors.

**DECISION OF THE BOARD;** May 17, 1982

1. In a decision dated March 22, 1982, in this application for certification, another panel of the Board directed that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

“All employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff.”

2. Pursuant to that decision, a pre-hearing representation vote was taken at the respondent's premises on March 30, 1982. Ballots were cast by forty-five of the forty-six employees who were eligible to vote. Twenty-five of those ballots were marked in favour of the applicant and nineteen were marked against the applicant. There was also one spoiled ballot.

3. A statement of desire to make representations with respect to the holding of that representation vote was filed in timely fashion by Mark Brockman, through his solicitors, on behalf of a group of employees who sought to have the results of the vote set aside and a new vote ordered. In support of that request, the objectors alleged that certain electioneering had taken place during the “silent period”, that certain employees in the voting constituency were not allowed to attend the applicant's organizational meetings, and that Ken Simpson, an International Representative of the applicant, was in the respondent's lunchroom speaking to employees who were about to vote in the representation election. Accordingly, a hearing was held in Windsor at the request of the objectors for the purpose of considering the evidence and the representations of the parties with respect to the representation vote.

4. Since 1964 the members of a committee selected by the employees of the respondent have met from time to time with Lionel Pelletier, the owner of the respondent, to negotiate wages and other terms and conditions of employment. That committee was formed at the suggestion of Gaston Frenette, who played an active role in the activities of the committee and in the applicant's organizational campaign. Mr. Frenette was an employee in the voting constituency until the termination of this employment on February 26, 1982. Earlier that month Mr. Pelletier told the committee that since poor economic conditions had caused him to amass substantial debts, he wished to implement a wage cut. As a result, Mr. Frenette arranged for U.A.W. International Representative Ken Simpson to meet with employees of the

respondent on February 21, 1982 at the applicant's Windsor office to "explain the workings of a union". It was Mr. Frenette's evidence that all of the employees of the respondent were invited to that meeting, including Mark Brockman and Gary Young. Mr. Frenette also testified that Messrs. Brockman and Young told him that they were "working for Lionel" and did want to go to the meeting. Both Mr. Brockman and Mr. Young adamantly denied that they were ever invited to attend that meeting by Mr. Frenette. Approximately thirty-five of the respondent's forty-six employees attended that meeting. After Mr. Simpson had "explained all about the union" and answered employees' questions about it, he left the room to permit them to discuss among themselves whether they wanted a union or not. After he was called back into the meeting about fifteen minutes later, approximately thirty-one of the employees "signed up".

5. A second meeting was held at the applicant's Windsor office a week later. That meeting was attended by "twenty to thirty" employees, including a few who had not attended the first meeting. Not all of the employees were invited to attend the second meeting; in particular, those employees, including Messrs. Brockman and some of the other objectors who were perceived by Mr. Frenette to be opposed to certification of the applicant, were not invited. Mr. Brockman conceded in cross-examination that he socializes with members of management of the respondent and has a brother who is a member of management with whom he works very closely. When he learned of the (second) meeting through a conversation with one of the respondent's foremen, he approached Ron Knight whom he knew to be a supporter of the applicant, and told him that he knew there was a meeting and the wanted to attend it. It was his evidence that Mr. Knight told him that he (Mr. Knight) and the other union supporters did not want him to attend the meeting. It was Mr. Brockman's contention that if he had been permitted to attend the meeting, he would have been able to bring to the attention of employees that "it will cost \$30,000 for the U.A.W. to negotiate a contract", and various other matters that would have "allowed the other employees to make a more responsible and considered choice in the vote."

6. Mr. Young also testified that he was told by various union supporters, including Messrs. Frenette and Knight, that they did not want him to attend that meeting. Paul Thiebert, another employee who was subpoenaed as a witness by the objectors, also testified that he was dissuaded from attending that meeting by union supporters. Employee Larry Janisse testified that although no one told him not to go to the meetings, he was unable to attend any of the meetings because no one would tell him where or when they were being held.

7. It is unnecessary for the Board to resolve the conflicts in the evidence concerning whether certain of the employees were or were not invited to attend the organizational meetings. For the purposes of this decision, we will assume without deciding that certain employees in the voting constituency were invited to attend neither the February 21st nor the February 28th meeting and that union supporters told at least some of the objectors that they were not welcome to attend the second meeting. Refusal to invite or to permit attendance by all employees in the proposed bargaining unit at an organizational meeting neither violates the Act nor provides a basis for setting aside a representation vote. Organizers are no more required to invite each and every bargaining unit employee to an organizational meeting than they are to approach each and every employee to invite him or her to join the union. Once a union has signed at least thirty-five per cent of the employees into membership, it is free to apply for certification via a pre-hearing vote. There is nothing in the Act which requires an applicant for certification to approach all of the remaining employees either individually or collectively prior to the vote. A requirement that all employees be invited or permitted to attend union

organizational meetings would ignore the realities of the milieu in which union organizers must function. It has been the experience of this Board that many employees are fearful that signing a union card or otherwise supporting an organizational campaign may lead to loss of their employment or other job related penalties. Indeed, the Board's experience in adjudicating unfair labour practice complaints under section 89 of the Act indicates that there is considerable justification for such fear in some instances. To impose upon organizers a requirement that all employees be invited or permitted to attend organizational meetings, regardless of how close an association with management they are perceived to have, would stultify organizational activities which are protected by the Act in the interest (identified in the preamble) of furthering "harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees." That is not to say that employees opposed to certification are not free to voice their views. Subject to the provisions of the Act which preclude unfair labour practices such as employer interference in the formation, selection or administration of a trade union, intimidation, and coercion, such employees are free (at times other than the "silent period") to meet with other employees singly or in groups to discuss their opposition to the union and to attempt to persuade them to adopt a similar point of view. Staunch union supporters whose pro-union advocacy might weaken or destroy the objectors' electioneering activities need not be invited or permitted to attend any such meetings or discussions; objectors are free to invite certain employees to such meetings and to refuse to permit other employees to attend. Any attempt by the Board to regulate closely such activities by requiring supporters to afford an equal opportunity for objectors to speak to employees at organizational meetings, and vice versa, would be unrealistic, virtually unenforceable and undesirable from a labour relations perspective. The fact that in the present case Mr. Brockman elected not to attempt to organize a meeting of employees for the purpose of expressing his opposition to the applicant because he felt that it would be futile since he "[doesn't] have any influence over them" does not detract from the fact that he and the other objectors were at liberty to arrange meetings and use other lawful means of electioneering to attempt to persuade employees to vote against the applicant. For the foregoing reasons, the Board is not prepared to direct that a further representation vote be taken on the ground that some of the employees were not permitted to attend the applicant's organizational meetings.

8. As conceded in argument by counsel for the objectors, there is no evidence before the Board in these proceedings of any breach of the "silent period". Accordingly, it is unnecessary to consider whether the alleged electioneering would, if proven, have prompted the Board to direct that another representation vote be taken.

9. It was submitted on behalf of the objectors that a new vote should be ordered because Mr. Simpson was present at the respondent's premises in the vicinity of the polling area during part of the one hour period for which the poll was open. In accordance with the voting arrangements that were agreed upon at the pre-hearing vote meeting, the poll was located in the quality control room of the respondent's plant and was open from 3:15 to 4:15 p.m. Mr. Simpson, who was to be the applicant's agent at the count, arrived at the plant at approximately 3:45 p.m. that day. After entering the respondent's premises through the front door, he asked a secretary if the voting had been completed, as the Board's Returning Officer had previously advised the parties that the poll might be closed before 4:15 p.m. if each of the eligible employees had voted before that time. The secretary responded that she did not know and directed him to Mr. Pelletier's office. Mr. Pelletier, who was speaking with counsel for the respondent (who was to be the respondent's agent at the count), advised Mr. Simpson that he



understood that there were two or three employees who had not yet voted. Mr. Simpson then returned to the front door and stood there to await the completion of the vote. A number of employees were seated at tables in the employee cafeteria located immediately adjacent to where Mr. Simpson was standing. It appears that many of those employees were evening shift employees awaiting the commencement of their shift at 4:00 p.m. Some of them acknowledged Mr. Simpson's presence by waving or calling a greeting to him. The location which Mr. Simpson was standing was a considerable distance away from the polling area in the quality control room and could not be observed from that location. After a minute or two, Gerald Rivard, who was known to be a union supporter by many if not all of the respondent's employees, approached Mr. Simpson together with another employee named Zeitoun. When they reached the place where he was standing, Mr. Simpson asked them if they had voted and they told him that they had already done so. Mr. Zeitoun then informed Mr. Simpson the he had requested of Mr. Pelletier a six month leave of absence to permit him to return to his home country and Mr. Pelletier had told him that he would have to obtain the permission of the union. Mr. Simpson advised Mr. Zeitoun that the applicant would have no objection to him getting a leave of absence provided that the majority of the people in the plant did not have any objection. Those employees then left Mr. Simpson who remained standing by the front door until shortly before 4:15 p.m. when he approached the quality control room. Upon arriving at the transparent door to that room, he observed that there was no one in the polling area except the scrutineers and the Board's Returning Officer. The Officer immediately came over to the door and opened it to speak with Mr. Simpson, who asked if the vote was completed. The Officer replied that the poll would remain open for a further minute and a half as there was one employee who had not yet voted. Mr. Simpson then stepped back approximately ten feet and waited for the poll to close. No employee came to vote during that brief interval prior to the closing of the poll.

10. In considering whether a further representation vote ought to be directed due to the presence of a representative of one of the parties, other than its scrutineer, in or near the polling area during a representation vote, the majority wrote as follows in *Associated Tube Industries*, [1981] OLRB Dec. 1705:

"13. As indicated by the Board in *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. Apr. 350, at paragraph 4, '[i]n assessing the conduct of the parties during the taking of a representation vote the Board is concerned that such conduct not have destroyed the secrecy of the ballot or have created a situation where the vote was not likely to disclose the true wishes of the employees.' See also *Anderson Metal Industries*, [1981] OLRB Rep. Apr. 415, in which the Board stated (at paragraph 9):

'In deciding whether to exercise its discretion under section 92(5) to direct a further representation vote, the Board's concern is whether it can rely on the vote taken on January 30, 1981 as representing the true wishes of the employees. As stated in *Armoured Floor Company Limited*, [1981] OLRB Sept. 793, at paragraph 5, 'the Board has indicated the kind of climate which it considers suitable for the exercise of an individual employee's personal choice in casting his vote in *Volverine Tube Division of Calumet and Hecla of Canada Ltd.* 63 CLLC ¶ 12,296 at 1228 wherein it refers to *Rogers Majestic Limited* D.L.S. 7-1382 as follows:

‘Its Primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressure and influences as the voting day approaches. The Board’s view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote.’”

(See also *The Great Canadian Pizza Company (Division of 401825 Ontario Limited)*, [1980] OLRB Feb. 216; *Constellation Hotel Corp. Ltd.* [1974] OLRB Rep. Nov. 799; and *Zehr’s Markets Limited*, [1971] OLRB Rep. Oct. 638.)

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15. It is preferable that all persons, including union officials and members of management, who are not directly involved with the conduct of a representation vote absent themselves from the vicinity of the polling area while the vote is being conducted in order to remove the temptation to engage in electioneering and propagandizing, and to eliminate any possible objection to the validity of the vote on the basis of their presence. The presence of such persons in that vicinity during the course of the vote is a factor that must be considered by the Board in the light of all of the other relevant circumstances, in determining whether another vote should be directed. Thus, in the *Zehr’s Market case*, *supra*, the congregation of ‘up to seven’ management personnel in the area immediately adjacent to the polling booths was found by the Board to be a circumstance that would tend to bring pressure on the employees who entered the booths to cast their ballots, in the context of a situation in which the employer had clearly indicated to the employees its opposition to the applicant union and had, within the week before the vote, superimposed an alternate choice of an employee association that it had informed employees it would be willing to recognize. Similarly, in *Constellation Hotel Corporation Limited*, [1974] OLRB Rep. Nov. 799, ‘the presence of management personnel in a strategic location in the vicinity of the polling area in full view of the employees as they proceeded towards the ballot box’ was one of the circumstances which persuaded the Board to direct that a further representation vote be taken. However, other relevant circumstances included the visible ‘ticking off’ of employee names on a list held by one of the members of management in question, a ‘shouting match’ that subsequently developed in the vicinity of the polling area between those members of management and an organizer employed by the applicant union, the ‘cloak and dagger’ scenario during which officials of the union and the employer surveyed each other’s activities on the employer’s premises, and the presence as scrutineers of relatively high ranking officials on behalf of both the union and the employer.

16. Although the Board prefers that all persons not directly involved with the conduct of the vote absent themselves from the vicinity of the polling

area while the vote is being conducted, that is not an absolute requirement. The Board has held in a number of cases that the mere presence of extraneous representatives of one of the parties in or near the polling area will not by itself inevitably lead the Board to conclude that a situation has been created wherein the vote is not likely to disclose the true wishes of the employees; see, for example, *Neelon Steel Limited*, [1965] OLRB Rep. Nov. 548; and *Hostess Food Products Limited*, [1975] OLRB Rep. March 218....”

11. Having regard to all of the evidence and the submissions of the parties, the Board is of the view that the impugned conduct of Mr. Simpson did not destroy the secrecy of the ballot or create a situation in which the representation vote would be unlikely to disclose the true wishes of the employees. As the applicant's agent at the count, Mr. Simpson had a legitimate reason for being present at the respondent's premises that afternoon. Moreover, his arrival prior to 4:15 p.m. was quite reasonable in view of the Officer's suggestion that the polling booth might be closed before 4:15 p.m. if all of the eligible employees cast their ballots before that time. While it would have been preferable for Mr. Simpson to have avoided speaking with any of the respondent's employees prior to the completion of the vote so as to eliminate any possible objection to its validity on the ground of such conversation, we are satisfied that his conversation with employees who had already cast their ballots does not provide a basis for setting aside the vote in the circumstances of the present case. (Cf. *Anderson Metal Industries*, [1981] OLRB Rep. April 415). Similarly, his presence outside the polling area prior to the closing of the poll could not have affected the validity of the vote in any way since no one cast a ballot during that interval. Even if it were to be hypothesized that the one employee who did not vote might somehow have been dissuaded from casting a ballot by the presence of Mr. Simpson (despite the fact that there is no evidence that the employee in question was even present at the premises at that time, much less that he was in any way influenced by Mr. Simpson's presence), the result of the vote would remain unchanged since one more ballot cast either in favour of or in opposition to the applicant would not have changed the fact that more than fifty percent of the ballots were cast in favour of the applicant.

12. For the foregoing reasons, the Board in the exercise of its discretion under section 103(5) of the Act, declines to direct that a further representation vote be taken.

13. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

14. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The Board is satisfied that not less than thirty-five percent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

16. As noted above, on the taking of the pre-hearing representation vote directed by the Board, more than fifty percent of the ballots cast were cast in favour of the applicant.



17. A certificate will issue to the applicant.

18. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

**2135-79-R Labourers' International Union of North America,  
Local 183, Applicant, v. F. W. Woolworth Co. Limited, Respondent, v.  
Group of Employees, Objectors.**

**Certification – Petition – Petition originated and circulated by “lead hand” previously found by Board to be not management – Whether perceived as manager – Board finding petition voluntary**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *B. Fishbein and T. Spada for the applicant; R. A. Werry for the respondent; Tyrone V. Smith and Clement Young for the objectors.*

**DECISION OF M. G. MITCHNICK, VICE—CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; May 13, 1982**

1. This is the continuation of an application for certification.

2. The history of this application is unusual in terms of its length, and should be recited briefly. The application was filed on February 15, 1980. Timely statements in opposition were also received prior to the terminal date set by the Board. At the hearing of the application an issue arose as to whether the applicant was entitled to apply for certification for a bargaining unit consisting solely of the employees at the respondent's Humberline warehouse. After lengthy examinations by a Labour Relations Officer, the Board by decision dated June 29, 1981, decided that it was. Even on that basis, however, there were challenges to the respondent's list, the applicant taking the position that the Head Receiver, Randy Defino, the Head Shipper, Earl LeBlanc, the Assistant Head Shipper, Earl Anderson, and the lead employee in the Customer Service Department, Tyrone Smith, exercised managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*, or alternatively, did not share a community of interest with the other warehousing staff in the bargaining unit. After further examinations by a Labour Relations Officer, the Board by decision dated January 26, 1982, rejected both submissions of the applicant with respect to all four individuals, essentially finding that Messrs. Defino, LeBlanc and Smith were no more than “lead hands” and properly included with the bargaining unit.

3. There were filed in this matter timely statements in opposition to the application. The statements in opposition indicated that the employees who signed them no longer wished

to be represented by the applicant trade union. If the signatures on the petition were found by the Board to be voluntary, the applicant would have unequivocal evidence of employee wishes with respect to less than fifty-five per cent of the bargaining unit. In such circumstances, the Board would normally exercise its discretion to seek the confirmatory evidence of a representation vote. The Board accordingly scheduled a further hearing to inquire into the voluntariness of the signatures on the petitions.

4. The petitions were filed with the Board by Mr. Tyrone Smith, the individual whom the Board in its previous decision has found to be a “lead hand” in the Customer Service Department of the respondent’s warehouse. Mr. Smith has worked at the respondent’s warehouse for a number of years. At the time of the application for certification, he testified, he was approached by a fellow employee and asked if he wanted to sign up for the union. Mr. Smith considered the matter overnight and then indicated to the employee that he was not in favour of joining. While Mr. Smith’s memory was somewhat hazy over precise dates, one gathers from a fair reading of his evidence that over the course of the next few days he learned from general discussions that there were other employees in the warehouse similarly opposed to union representation, and Mr. Smith decided at that point that he ought to circulate a petition against the union which all those desirous of signing could sign. Asked why he opted against the union, Mr. Smith testified that he was a family man, and that he had friends who had been in companies with union representation, and ended up losing their homes and being out of a job for months (presumably a reference to strikes). He added that he was satisfied with his own salary at Woolco, and felt that job security depended more upon the merits of the particular individual, than it did upon whether the company was union or non-union. He stated that he learned from the Board’s green sheet that was posted what it was that employees had to do if they were opposed to the application and testified that he took the matter into his own hands because “somebody has to take the lead”. He said that he phoned the Labour Board to obtain more information, and that a man he spoke to, whom he could not identify, explained to him in a lengthy conversation what he could and could not do.

5. Mr. Smith testified that he wrote a petition up on his own, and proceeded to circulate it amongst the employees in the warehouse during lunch and coffee breaks, in the employees’ lunchroom. He testified that his supervisors also use the lunchroom for their lunch, but that he could not recall any supervisor ever being present when he was circulating the petition. He testified that the man from the Labour Board had told him that management was not to be involved, and that he therefore was cautious not to exhibit the petition when anyone from management was present. He testified further that it was “fair knowledge” that other employees actually approached him to sign it. Whenever an employee signed the petition, Mr. Smith had another employee sign as a witness. He indicated that he did this because he was told by the man from the Labour Board that the signatures all had to be witnessed. When Mr. Smith had gathered all the signatures, he took the petition to the Post Office, after work, and sent it to the Board by registered mail. He also submitted a second petition, with the signature of one employee on it, to the Board, but as the parties were advised, this petition was not material (in terms of an overlap) to the Board’s inquiry. He subsequently retained the services of a lawyer through the Law Society Referral Service, the number for which he says he obtained from the telephone book. Counsel was present with Mr. Smith on previous days of hearing, but not on the day on which the Board’s inquiry into the petition was conducted. Mr. Smith testified in cross-examination that he had not yet paid the solicitor for her services, because he had been intending up until a week previous to have her represent him on this inquiry as well. He testified that he decided not to engage her services for the final

hearing because he felt that he had learned enough by that time to represent himself. He testified that he had made no arrangements with the company to cover the payment of his solicitor's fee, and that he had already collected money from other employees in the bargaining unit directed toward that purpose.

6. Mr. Smith was asked in cross-examination if any of his signatures were collected on the shift, and he indicated that none of the employees who signed worked the second shift. He was then asked, whether or not the employees were permanently assigned to the second shift, if it was possible that some were in fact working overtime in the warehouse during the evening hours, and signed the petition during the evening hours, and signed the petition during the evening break. Mr. Smith then conceded that that was possible. He was asked whether he was certain that no one from management was in the lunchroom at any of the times that employees were signing the petition, in particular on an evening shift. Mr. Smith repeated his earlier testimony that he made it a practice not to exhibit the petition when management was around. He said that he could not recall ever showing the petition to Mike Pearson, his supervisor, and that he did not think that was possible, because Mr. Pearson is a member of management, and the Labour Board had warned him about that.

7. This line of questioning was directed at the only evidence which the applicant called to contradict Mr. Smith. Kurt Mackenzie, a warehouseman in the respondent's shipping area, testified that he "thought" Mike Pearson, a supervisor, had been eating his lunch at one of the other tables in the lunchroom one evening when Mr. Smith was circulating his petition amongst the members of the night crew assembled there. Questioned further, Mr. Mackenzie stated that he was "pretty sure" that Mr. Pearson had been there, because he seemed to recollect that the whole crew was in there. He thought he remembered the incident on that particular night because it was unusual for Mr. Pearson to be the supervisor on the night shift. Mr. Pearson is the Material Handling Supervisor, and appears to be the immediate supervisor of the employees in the warehouse when he is on shift. He testified that he did not notice Mr. Smith circulating a petition at any time that he himself was present, and that he in fact was filling in as the night-shift supervisor for the entire month of February. Putting Mr. Mackenzie's evidence at its highest, the Board on balance concludes that even if Mr. Pearson did happen to be eating his lunch in the lunchroom on one occasion when Mr. Smith was circulating the petition amongst other employees, his involvement, based on the obliqueness of Mr. MacKenzie's own recollection, was not such as to cause a reasonable employee apprehension about managerial complicity, bearing in mind that the employees were on lunch-hour at the time.

8. The applicant's primary ground of attack on the petition is the fact that Mr. Smith himself, the petition's main proponent, is a "lead hand" in the warehouse, whom the Board in its earlier decision found in certain respects did "stand apart" from other employees in the unit. The applicant argues that the Board cases establish that that alone is sufficient. The cases relied upon, however, fall short of establishing an approach that is that clear-cut.

9. The Board cases have made it clear that in dealing with the voluntariness of a petition, it is unnecessary to find that a challenged individual in fact exercises "managerial functions", within the meaning of section 1(3)(b) of the Act. Rather, it is sufficient if the person is *perceived* by employees as possessing sufficient authority to affect their employment status. A person who is not "managerial" has a *prima facie* right to participate on either side of



an organizing campaign, and whether his involvement in a petition against the union will be sufficient to impair the voluntariness of a petition depends on the extent of the authority perceived, together with the surrounding circumstances. The Board has reviewed the cases relied upon by the applicant. In *I. M. Pastushak*, [1980] OLRB Rep. July 979, the crew leader was the only supervisor in the field for the respondent's survey crew, and made regular reports on the crew's performance to head office. The evidence also establishes that, prior to the other employee in the crew signing the crew leader's petition, the crew leader indicated to the employee that he had already told the boss that he would be taking up a petition against the union. In *Quality Circuits*, [1979] OLRB Rep. Aug. 794, there were no persons in the position of actual foreman in the respondent's organization, so that the lead hands were the respondent's only floor supervision and reported directly to the plant manager. In *Trent Electric*, [1976] OLRB Rep. April 163, the petitioners had distributed ballots in envelopes for employees to mark anonymously, and one batch of envelopes was given to a lead hand to distribute. The petitioner testified that he received the envelopes back from the lead hand later in the day, and deposited them in the sealed ballot box. The petitioner did not realize the necessity of having the lead hand present to testify as well, and the Board commented adversely with respect to his absence. The Board noted the particular concern that arises when the individual who is missing stands in the position of a group leader or lead hand; the Board also made it clear that the absence of direct evidence of where and how *any* of the employees were approached and asked to mark their ballots was fatal to the probative value of those ballots. In *Dad's Cookies*, [1976] OLRB Rep. Sept. 545, the so-called lead hands were in fact more commonly referred to as "foreladies", and the evidence made it clear that they exercised substantial and significant authority on a daily basis over the employees on the floor. In *Leamington Vegetable Growers*, [1974] OLRB Rep. June 402, the leader in question admitted to being regarded as a "boss", and there was in that case the additional problem of open and unfettered circulation of the petition during working hours which contributed to the impression of tacit managerial involvement. This latter point was also the main stumbling block in a recent unreported decision of the Board in *Strano Foods Limited*, Board File No. 2806-80-R, released September 30, 1981. In *General Crane*, [1974] OLRB Rep. Oct. 662, the lead hands again were perceived as "bosses", who had effectively recommended both promotions and pay increases, and who were couched with the authority to reprimand other employees. There was in that case as well the taint of a prior petition in which members of management had been actively and improperly involved. In *Great Atlantic & Pacific Tea Company*, [1969] OLRB Rep. Nov. 947, the lead hand was in fact at the time the "acting" department manager and in his own testimony described himself as being "in charge" during that period. The case which comes closest to assisting the applicant is that of *Becker Milk*, [1966] OLRB Rep. Apr. 37, in that the regular "supervisory" functions of the individuals in question most closely approximated those performed by the lead hands in the present case. There, however, the Board found that these same individuals in effect took over the job functions of the plant manager on the latter's days off, and had in fact had occasion to seriously affect the employment status of an employee in the past.

10. In the present case the Board, in its earlier decision on the issue of managerial status, had this to say about the three "lead hands" in the respondent's warehouse:

3. For the purposes of the applicant's challenge, the four persons in dispute can be dealt with as a group. It is clear that all four of these individuals spend the bulk of their time performing physical work side by side with, and of the same nature as, the other warehouse staff in the unit. Messrs. Defino, LeBlanc and Anderson report to Mr. Pearson, the

Assistant Warehouse Manager, and Mr. Smith reports to Mr. Dougherty, the Traffic Co-ordinator. These two individuals in turn report to the Warehouse Manager, Mr. Reid. Mr. Defino and Mr. Anderson, at least, are paid at a premium rate above the other warehousemen, and all four have access to a red Woolco blazer which they wear from time to time. Mr. Defino and Mr. LeBlanc have a desk in the small shipping office located in the warehouse, and Mr. Smith has a desk located elsewhere in the warehouse. It is clear that in meeting with members of management to receive the overall work assignments, in distributing those assignments amongst the members of the crew, and in checking to some degree the work being performed, these individuals carry out the normal function of a "group leader", or a "lead hand". In the absence of the persons to whom they normally report, their responsibilities of course increase marginally. They have in their possession keys that others do not have, and they are normally the individuals in the bargaining unit to have contact with company customers. To the extent that overall records are made and verified in each department, these individuals appear to be mainly the ones who do it. They do not, however, appear to become involved in reporting disciplinary incidents to any significant degree more than other members of the bargaining unit, and their overall impact on the working lives of their fellow warehousemen appears minimal. As the Board observed in the case of *Rehau Plastiks of Canada Ltd.*, [1979] OLRB Rep. Sept. 910, in considering the "lead hands" before it:

7. There is no evidence of the lead hands having authority for such matters as setting work schedules, deciding if overtime is to be worked, monitoring absences of employees, discipline, complaints resolution, hiring or firing. Nor is there any evidence that they influence these matters by means of effective recommendation.

4. In the present case, while the individuals in question do stand apart, as noted above, from the other members of the bargaining unit, they appear to perform the classic functions of a "group leader", and the red jacket, if it reflects anything other than customer contact, appears to reflect no more than this. Each case must be judged objectively on its own facts: *Corporation of Thunder Bay*, [1981] OLRB Rep. Jan. 6. On the evidence, the present individuals fall well short of meeting even the "effective recommendation" test enunciated in *Inglis Ltd.*, [1976] OLRB Rep. June 270, and the Board finds no basis for excluding them under section 1(3)(b) of the Act.

It should be noted that not all of the lead hands performed all of the functions referred to by the Board in the paragraphs above. This was particularly true of Mr. Smith, who had only one, and at times two other employees working in the Customer Service Department with him, and generally had less contact with management. The Board lumped all of the various duties performed by the lead hands together, to expedite its decision and also to put the applicant's case at its best. The Board has no reason to depart from this approach in assessing the issue of voluntariness of the petition, since a scanning of the petition reveals that there were others amongst the individuals in dispute who signed at various points in the petition. The Board has



frequently expressed its concern over the voluntariness of the signature of any employee signing a petition after a person perceived by him to be a “boss”, or capable of affecting his employment status. But while the evidence from the Examiner’s report left no doubt as to who would be perceived by employees as the group leaders or lead hands in the warehouse, the evidence fell far short of establishing even peripheral management functions of the kind that would concern the Board. Indeed, after reviewing the report of the Examiner on the duties and responsibilities of the individuals the applicant had challenged, the Board surmised that the challenges arose more likely from the applicant’s apprehension of the position in which it stood on the membership count, than from its own understanding of the criteria which the Board normally applies in these matters. In any event, the Board is of the view that Mr. Smith and the other lead hands in the warehouse possess minimal supervisory responsibilities only, and there is nothing in the evidence to suggest that they are perceived any differently by the employees. The Board cannot conclude, therefore, that the role played by Mr. Smith (or the other lead hands) in connection with the instant petition would prevent the Board from finding that the acts of other employees in signing were voluntary. While the involvement of an individual who stands apart from the rank-and-file must be considered with care, whether the Board ultimately concludes that the petition can be given no weight depends on all of the facts in each case (compare *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551). The Board declines to discount the petition in the present case merely on the ground of Mr. Smith’s status.

11. Perhaps the strongest attack on the petition is the credibility of Mr. Smith as a witness. Needless to say, it is fundamental to a finding of voluntariness of a petition that the Board believe the petitioner himself. In the present case, it must be noted that the quality of Mr. Smith’s evidence, both as a witness in the examinations conducted by the Labour Relations Officer, and in the petition hearing before the Board, was noticeably less than ideal. Mr. Smith’s account of the petition did not, however, lack overall credibility, and he did make concessions at certain points which spoke in favour of his candour. The applicant is really asking the Board to look behind the evidence that it has before it to infer that management has somehow been involved. Considering Mr. Smith’s testimony in context, and the lack of any other evidence before the Board which would cause it to have more than ordinary concern, the Board is not prepared to draw the necessary inferences. The Board finds insufficient grounds before it, therefore, to reject the statements in opposition to the application as involuntary.

12. There have been, since the time that this application began, charges against the respondent levied by the applicant and upon which the applicant was seeking to be certified without the taking of a representation vote, pursuant to the provisions of what is now section 8 of the *Labour Relations Act*. When the matter was taken over by this panel of the Board, the parties advised that they had agreed amongst themselves to have the Board determine the issue of the voluntariness of the petition, after which the applicant would review its position with respect to its section 8 charges, if necessary. The Board has dealt with the matter as agreed upon by the parties, and has now rendered its decision on the petition. The applicant must now consider whether it wishes to proceed with its charges and request under section 8 of the Act, or whether it wishes the matter to be dealt with immediately by way of a representation vote. If the applicant does wish to pursue the former course, the Board directs it to deliver to the Board written notice to that effect within 10 days of the date of this decision, and the Board will proceed through the Registrar to schedule continuing dates for hearing.



**DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. I dissent.
  2. I am not satisfied that the statement of desire circulated by Tyrone Smith represents the voluntary expression of the true wishes of the employees.
  3. I do not believe that Mr. Smith was a credible witness and I further believe that he is perceived by the employees to be a member of the management team.
  4. His lack of credibility as a witness draws from the following evidence. Mr. Smith testified that he wrote and circulated the petition on his own and was cautious not to exhibit it when management was present. However, he further testified that he could not recall whether he had shown it to Mike Pearson, the material handling supervisor. Kurt Mackenzie testified that Mr. Smith in fact collected signatures on the petition one evening in the presence of Mr. Pearson. The majority has noted the questionable nature of Mr. Smith's evidence both under examination by the Labour Relations Officer and before the Board.
  5. In addition, I must record that Mr. Smith is distinguishable from the other employees in the bargaining unit in that he is a lead hand in Customer Service and could be perceived as a representative of management.
  6. I would give no weight to the statement of desire. I would reject it on the ground that it was conceived and circulated by a representative of management. I base this decision on the lack of the credibility of Mr. Smith as a witness, and on the fact that he was someone who could be perceived by employees as being in a position in which he could make decisions affecting their employment.
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**1081-81-M Robert P. McEachran, Applicant, v. The York University Faculty Association, Respondent Trade Union, v. The Board of Governors of York University, Respondent Employer**

**Religious Exemption – Applicant having history of opposition to trade union – Never having raised religious reasons until present application – Mixture of religious and non-religious reasons – Board finding objection not based on religious reasons – Board finding objection not based on religious grounds**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *G. Vandezande for the applicant; S. Price and H. Buchbinder for the respondent trade union; no one appearing for the respondent employer.*

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; May 7, 1982**

1. The applicant has applied pursuant to section 47 of the *Labour Relations Act* for an order from the Board that he be exempted from paying due, fees or assessments to The York University Faculty Association ("the Association") because of his religious conviction or belief. The applicant is one of several persons who have sought relief under section 47 of the Act from recently negotiated, compulsory checkoff provisions contained in the current collective agreement between the Association and the respondent employer ("York"). Section 47 of the Act provides that:

47(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and

only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

2. When considering applications under that section for relief from payment of dues, fees or assessments, the Board has identified in its decision in *Helen Wybinga*, [1976] OLRB Rep. Aug. 422, three questions which it must ask itself about the nature of the applicant's beliefs and these are:

1. Are the beliefs sincerely held?
2. Are the beliefs religious?
3. Are the beliefs the cause of the objection to paying dues to the trade union?

In the case at hand, in order for the Board to be able to issue the exemption order sought by the applicant, it must be able to answer each question in the affirmative. The Board has no difficulty, on the evidence before it, in answering the first two questions in the affirmative. There is no doubt, in the Board's view that the applicant has strong personal religious beliefs, sincerely held. The difficult question is whether the applicant's religious beliefs are the cause of his objection to paying dues to the Association.

3. Like the other applicants whose request for relief from the requirement to pay dues to the Association under the current collective agreement between it and York have already been determined by the Board, the applicant herein has a history of opposition to the Association. See the Board's decisions in *The Board of Governors of York University*, [1981] OLRB Rep. Sept. 1319 (re Douglas N. Butler), and in *The Board of Governors of York University (Jordan)* [1982] OLRB Rep. Jan. 149; re *Alfred B.P. Lever*, Board File #1080-81-M issued January 11th, 1982 (unreported); re *Helen Sarah Freedhof*, [1982] OLRB Rep. Jan. 135; *O. Aspinall*, Board File #1076-81-M, issued February 5th, 1982 (unreported); re *James S. Tait*, Board File #1526-81-M, issued February 5th, 1982 (unreported); and re *Walter Beringer*, Board File #1077-81-M, issued February 15th, 1982, (unreported).

4. The applicant has been employed by York since July 1, 1964 and is a professor of physics. He became a member of the faculty association which was the forerunner of the Association when it was first formed. He ceased his membership when that association adopted a procedure of collecting dues from members by salary deduction. He re-joined it when that system was revoked. He resigned his membership the second time in December 1975 when the association was moving towards becoming a trade union within the meaning of this Act. He affiliated himself with other faculty members who were opposed to this move by the association. They referred to themselves as the Independent Faculty Members ("the IFM"). The applicant was not one of the group of IFM members who appeared at Board hearings to oppose the Association's application for certification in 1976. Nor did he partake in the instructions of counsel acting for the IFM. His support of the organization was limited to financial contributions and attending a few of its meetings.

5. When the Association was successful in becoming certified and in concluding a collective agreement with York, the applicant availed himself of the provisions contained in the first two agreements which permitted persons who were not members of the Association to opt out of having an amount equivalent to membership dues in the Association deducted from



their salaries and remitted to the Association. Instead, providing they duly filed a declaration that they did not want to pay dues to the Association "...on grounds of affirmatively expressed religious belief or personal conviction,...", they could have the equivalent amount deducted and remitted to a stipulated bursary/scholarship fund. His declaration was addressed to Mr. W. D. Farr, and executive of York and its text is set out below:

I, Robert P. McEachran, of the Faculty of Science, York University, hereby notify the University that I do not wish any salary deduction to be made from monies that are owed to me or may in the future be owed to be by the University for the purpose of fees, assessments or dues specified by the York University Faculty Association.

I make this notification pursuant to the provisions of a purported Collective Agreement between York University and the York University Faculty Association without prejudice to my right to object to the validity of such Agreement at any time.

I further request that if any monies are deducted from monies owed to me in lieu of Association dues, fees or assessments pursuant to the provisions of the purported Collective Agreement, such monies be paid into the Ruth Hill Memorial Scholarship Fund referred to in the purported Collective Agreement.

Although unions were justified in the far distant past, in the days of the sweat shops and coal pits, as a means of needed social reform, it is my strong personal conviction that unions with their adversary (employee vs. management) nature have long outlived their usefulness and are now a detriment to both the country and society. In more enlightened societies the original union concept is slowly being dispensed with and is gradually being replaced by a system whereby employees are involved in a more collegial manner in some management decisions.

It is my personal conviction that for a University to revert to the original union concept is an abhorrent and retrograde step which will further degrade its public image, seriously inhibit its academic functions and responsibilities, and encourage its demise to an Institution of intellectual mediocrity.

Thus to be compelled to be a member of YUFA I would find both morally and professionally debasing.

6. The applicant was also one of 277 faculty members who signed a petition filed with the Board of Governors of York in support of retaining the "opting out" provision referred to above because of an apprehension that it might be negotiated out of the 1978-80 collective agreement. He was not an organizer of the petition and did not partake in its circulation other than to sign it. While the provision was retained in that agreement, it was removed from the successor agreement which was signed May 13th, 1981. When the applicant became aware that this was to be the case, he addressed a letter to Farr dated April 29, 1981, the text of which states:

Please be advised that I cannot in good conscience join and/or pay dues to the York University Faculty Association because of my religious convictions.

His application for an order under section 47 of the Act was filed August 12th, 1981. The application stated the grounds on which the applicant was seeking exemption from the payment of dues to the Association in the following terms:

“Compulsory financial support of the York University Faculty Association violates my religious convictions and beliefs. My religious convictions and beliefs include such fundamental individual freedoms and human rights as those of freedom of speech, religion, association and assembly. I further believe that as a professional scientist, supported in both my teaching and research from the “public purse”, I have a firm *moral* obligation and commitment to society to discharge these responsibilities and to further enhance my profession to the best of my ability and at no time to *betray that trust*. Support of YUFA would be a betrayal of that trust.”

(emphasis is the applicant's)

7. The applicant is not a member of an organized church and while he periodically attends religious services he does not regularly do so. His religious beliefs are individual, personal ones and are based on the teachings of the Old Testament as expressed by the Ten Commandments and on the tenets of Christianity as expounded throughout the new Testament. He extends the Tenth Commandment of the Old Testament, “Thou shalt not covet thy neighbour's house, . . . thy neighbour's wife . . . nor anything that is thy neighbour's.” to mean that one must not in any way inflict harm on one's neighbour, possess him, infringe on his individual rights and freedom's, including his religious freedoms. He views as the central feature of the tenets of Christianity the requirements to love thy God with all thy heart and soul and strength and to love your neighbour as yourself and considers the teachings of the New Testament to be summarized in his paraphrase of the Golden Rule, “do unto others as you would have them do unto you”. He believes in God and his view of God is that He is the ultimate truth in the universe.

8. These beliefs evolved over time from his mid-teens, when he experienced a breach with his parents which involved him ceasing regular attendance at church on Sundays, through a period of atheism, then agnosticism until the beliefs crystallized in the early 1970's. Since then, they have been the principles by which he tries to live his life, but, until he brought this application, he had not discussed his religious beliefs with anyone including his wife, because two events during their evolution had caused him to conclude that religion was a very personal matter which was best kept within oneself. The first event was the breach with his parents over church attendance, following which religion was never again discussed between them. The second was being ostracized during his late teens by his friends because he insisted on expounding his atheistic views. He told the Board that he did not vary from his decision to keep his religious beliefs to himself and was reluctant to discuss them with Mr. Vandezande until Mr. Vandezande told the applicant that he would not represent him unless he was prepared to do so. This was a major reason, according to the applicant, but not the only one for using

“personal conviction” as grounds for opting out of the payment of dues to the Association in 1977. He chose “personal conviction” for two other reasons. He maintains first that the term is ambiguous and that the words “religious belief” could be substituted for it without changing the meaning of his objection and, second, that there is nothing more personal than religious beliefs and all of his religious beliefs are also personal convictions.

9. Were the applicant to be given the same option today, he would still choose to give “personal conviction” as his grounds for opting out, even if he knew that “personal conviction” would be held to be secular grounds. He gave three reasons for this stand: secular arguments are more universally understood than religious ones in a world where there is no single, universal church; the religious views of the person to whom he had to address his objections were unknown to him and he did not know if this person alone would determine the acceptability of the reasons; and religious beliefs, because of their intensely personal nature, should not be debated.

10. That explanation may assist in understanding why the applicant chose to ground his objection to the payment of dues to the Association on his personal conviction rather than his religious belief. Nonetheless, while his reluctance to reveal his religious beliefs as the basis of his objection may be understandable, it remains that they are the only grounds on which he can be relieved of the obligations of paying dues to the Association now that the opting out provision is not available. It was the apprehended loss of that option which caused him to write his April 29th letter to Farr, using for the first time his “religious convictions” as the reason for his inability to support the Association. When elimination of the option became a reality he made this application stating the “Compulsory financial support of [the Association] violates my religious convictions and beliefs.” The applicant maintains that his opposition to the Association throughout has been rooted in his religious beliefs even though, for the reasons which he explained to the Board, he characterized them as personal convictions until section 47 of the Act became the only avenue open to him to avoid support of the Association. In view of the assertion, the Board not only is entitled to evaluate the grounds advanced in support of this application in the light of his earlier opposition to the Association, it is obligated to do so before it can be satisfied whether it is the applicant’s religious conviction or belief that causes him to object to paying dues to the Association.

11. The facts with respect to the applicant’s opposition to the Association are limited to his financial support of the IFM, his attendance at a few of its meetings, his exercising of the opting out of the payment of dues to the Association and his signing of the 1978 petition. Neither his support of the IFM nor his signing of the petition required the applicant to declare or reveal the basis of his opposition. It could have been his religious beliefs, as he claims it was, or it could have been a mixture of grounds including his religious beliefs, or it could have been devoid of any religious component. In the absence of any need for him to reveal the grounds for his opposition, those actions are of neutral value in assessing his present grounds. Only when he opted out of paying dues to the Association was he required to make any declaration. Given the choice of declaring his objection on grounds either “...of affirmatively expressed religious belief or personal conviction,...”, he chose to declare “personal conviction” for the reasons given above.

12. Nonetheless, the applicant maintains that his opposition to the Association throughout was based on his religious beliefs and that his personal convictions are those principles by which he tries to live his life which, in turn, are rooted in his understanding of the



teachings of the Old and New Testaments and on which his religious beliefs are founded. His simple assertion that this is the case is not enough to make it so, however, and the Board must examine the substance of his assertion. The Board might find that assertion more persuasive if the applicant's "opting out" letter was expressed in terms which evoked a semblance of religious feeling. As it is, his concern that unions have become "...a detriment to both the country and society" and the observations offered before and after that comment in the third paragraph in his letter are entirely of a socio-political nature. Even if one accepts his equating of his "strong personal conviction" as used in that paragraph "with his personal religious beliefs" it does not raise the comments from essentially secular ones to religious ones. In the fourth paragraph the applicant focuses his general concern about the role of unions in society on the potential impact on a union at York. Again his concerns are expressed in secular terms without any hint of their relationship to his religious beliefs or his concept of God as the ultimate truth in the universe.

13. When the applicant was asked by Mr. Vandezande at the hearing what he meant in the fourth paragraph when he said "...to revert to the original union concept is an abhorrent and retrograde step...", he replied that the move away from collegiality was abhorrent and for the faculty at York to go on strike would downgrade it in the eyes of the public and, therefore, would be a retrograde step. The applicant also told the Board that salary conditions negotiated by the Association downgraded merit pay and that this condition, together with a provision in the collective agreement for reducing staff, when needed, on a last in first out basis without regard for merit, was a retrograde step because it promoted and emphasized mediocrity. These elaborations on the applicant's statements in his "opting-out" letter appear to the Board to be a further expression of his views as to what atmosphere should or should not prevail at York and do nothing to dispel the impression that they are entirely secular in nature and absent any link to his religious beliefs.

14. The link to his religious beliefs is made, however, in his explanation of the final paragraph of the letter. He told the Board that to compel him to support the Association financially by the payment of dues would be to compel him to support any actions which it might take, including a strike. This would be morally and professionally debasing because it would violate his responsibility to society. He sees his responsibility as arising from the fact that society provides the funds which support his academic pursuits, particularly his research. To violate that responsibility would be contrary to his religious belief that both testaments of the Bible obligate him to be responsible to and for his fellow man.

15. The applicant's concern about the adversarial nature of the collective bargaining relationship centres on the strike and similar job actions. At York he maintains that a strike would impact adversely and primarily on the students, who are innocent third parties, and not on the employer. A strike would also impact on outside groups which meet on the campus because picketing would frighten them away, a result he sees as being harmful to York's reputation at large. He considers other job actions contemplated by the Association during the last round of bargaining to be of a similar nature. To withhold students' grades would harm the students' chances for jobs or for graduate school and would be morally reprehensible. To not teach classes would be a dereliction of his duty. These products of the adversarial relationship violate the teachings of the New Testament that one must respect all individuals and the applicant's view of the tenth commandment that he must not infringe upon the rights and freedoms of others, teachings which underlie his religious beliefs.

16. The applicant told the Board that he does not consider all strikes to be actions contrary to the dictates of scripture as he interprets it, but he is fundamentally opposed to strikes in a university context because he considers them to be directed against the students and not against the employer. For that reason strikes at York would be contrary to the dictates of scripture and his religious beliefs. He holds the same view of strikes of ambulance drivers and doctors. On the other hand he does not hold the 1981 strikes of Stelco employees and major league baseball players to be actions contrary to his interpretation of scripture. He does not explain the distinction, but presumably he does not see them as injurious to innocent third parties. While he takes a similar position in respect of unions per se, that is he is not opposed to all unions but does object to the adversarial actions of some, particularly strikes, he would remain opposed to the Association as long as it remained a trade union and even were it to undertake not to strike, restore merit pay, abandon the last in first out principle for lay offs and the compulsory payment of dues.

17. It is from these facts that the Board must determine whether it can be satisfied that the applicant's objection to paying dues to the Association is based on his religious beliefs. One thing is clear from them; the applicant's objection is not based solely on his religious beliefs. No doubt his objection to strikes and other forms of job actions which harm or impinge upon innocent third parties is religious in nature. So is his objection to strikes at York which would interrupt his teaching and research and thus interfere with him fulfilling his duty to society which supports that work. His objection in both instances is based on the principles which underlie his religious beliefs, therefore it is religious in nature. On the other hand his views concerning unions not being appropriate in a university setting, the destruction of the collegial process, the downgrading of merit pay and the elimination of merit as a consideration in lay offs are more an expression of the applicant's ideas of what conditions should prevail in a university environment, or more to the point, at York. These are socio-political beliefs, not religious ones. This mixing of religious and socio-political motivation is particularly evident in the way the applicant has framed this application (see paragraph 6 above). In fact, were it not for his use of the phrase "my religious convictions and beliefs" in the first two sentences, there is nothing to associate his objection to being compelled to give financial support to the Association with his belief in God as the ultimate truth in the universe or to his perceived duty to obey the teachings of God as set out in both testaments of the Bible which are the cornerstone of the applicant's religious beliefs. It only became apparent that there was also a religious motivation to his objection when the applicant had the opportunity in the hearing to elaborate his views.

18. Mr. Vandezande argued that the presence of a non-religious motivation together with a religious one did not deny the applicant relief under section 47. Mr. Vandezande contends that section 47 entitles the employee to relief as long as his religious belief or conviction forms part of the employee's objection to paying union dues. In this respect he relied on the Board's decision in *Hogeterp v. U.A.W. v. General Motors*, [1972] OLRB Rep. Feb. 132, which states at paragraph 11:

11. "...it is not the religious convictions or beliefs of a certain religious sect that must be determined under section 39 [now section 47] of the Act. The religious conviction or belief on which the objection or belief must be based is the personal conviction or belief of the applicant and accordingly is a subjective matter. We are satisfied that the applicant objects to joining and supporting the respondent union because of his religious

conviction or belief. The fact that his conviction or belief grew out of his relationship with C.L.A.C. rather than the church of which he is a member in no way detracts from the nature of his religious objection. Again, although we accept the view that his motivation in making his application is based, at least in part, on his desire to have minority representation by C.L.A.C. by those who share his objections, his preference for C.L.A.C. is based on religious grounds. His support of C.L.A.C. and his religious convictions or beliefs are intertwined and indeed are inseparable. This dual motivation, because of its religious connotation, does not deprive the applicant of the relief afforded by section 39 of the Act. The “objection” referred to in section 39 of the Act need not [be] the *sole* objection or even the *primary* objection to membership or support of a trade union. As long as an applicant has a *bona fide* objection because of his religious conviction or belief, he is entitled to the relief afforded by section 39 even if he holds an objection to membership in and support of a trade union because of some other ground.

While that decision speaks of a “dual motivation” underlying Hogeterp’s objection, it was neither a dual nor a mixed motivation. This is evident from the Board’s comments immediately preceding the reference to dual motivation that

“Again, although we accept the view that his motivation in making this application is based, at least in part, on his desire to have minority representation by C.L.A.C. by those who share his objection, his preference for C.L.A.C. is based on religious grounds. His support of C.L.A.C. and his religious convictions or beliefs are intertwined and indeed are inseparable.”

Thus, when the Board went on to observe that the religious objection to membership in or support of a trade union need only to be *bona fide* and not the sole or primary cause for seeking exemption, its remarks were clearly *in obiter*. This fact was noted by the Board in *Helen Sarah Freedhof*, *supra*, at paragraph 27, which dealt with the issue somewhat differently (see *infra*).

19. The reliance of an applicant on dual or mixed motivation, as is the case herein where religious and non-religious motives co-exist, does not change the Board’s task as compared with a situation where a religious motivation alone is advanced as the reason for the objection. The test is the same. The Board must be satisfied that an applicant objects to the paying of union dues or joining a trade union because of his religious conviction or belief. If the Board is so satisfied, section 47 gives it the discretion to order whether the pertinent provisions of a collective agreement are to apply to an applicant. Before the Board decides on the exercise of its discretion, it must be satisfied that it is this applicant’s particular religious belief which prevents him from paying dues to the Association. The Board must find, in other words, that the applicant’s religious belief is standing in his way. That is what the Board has said at paragraph 28 of its decision in *Helen Sarah Freedhof*, *supra*, and in our view, that is all it says:

28. In this case there is an apparent *bona fide* religious conviction or belief on which the applicant bases her objection; however, there is also a



set of convictions or beliefs which are not religious on which the application is also based. As pointed out in [*Klaas Stel v. The North York Civic Employees' Union, Local 94, Canadian Union of Public Employees*, [1971] OLRB Rep. July 363.], section 47 is discretionary — the Board “may order” that the collective agreement provision does not apply. In *Stel* the Board declined to state how this discretion would be exercised, and all subsequent cases have wisely refrained from so doing. This Board will not comment on how the discretion should be exercised either; however, the wording of the section — *the need for the Board to be “satisfied” and the presence of the discretion — leads us to conclude that there never was any legislative intention that the exemptions should be granted automatically whenever an applicant could point to an apparent religious belief or conviction on which to base an objection, when the general overall thrust of the objection was not religious in nature. It is our view that, when the overall thrust of the objection is seen not to be religious, the objection cannot be characterized as being “because of [the applicant’s] religious conviction or belief” within the meaning of section 47.* The presence and relative importance and weight given to the obviously non-religious reasons must be considered, based on the evidence in each case. . . . *It should be noted that the burden is on the applicant to satisfy the Board, on balance, that section 47 relief should be granted, and that the applicant is not entitled to the benefit of any doubt.* [emphasis added]

20. The applicant is unquestionably of the view that all of his objections to paying dues to the Association are firmly grounded in his religious beliefs and therefore that he is entitled to relief from the obligation to pay those dues. The Board is not quite as ready to draw the same conclusion for several reasons. The applicant is selective about when strikes or unions are objectionable to him. Many of his objections are particular to his job and to the effect of unionization in a university setting, in other words, at York. He obviously attaches substantial importance to the climate in which he works, and so he should. But most of the job actions and products of the collective bargaining process which he fears will adversely influence that climate are the very matters which are the source of his non-religious concerns. Indeed, the paramount position of these concerns amongst all of the grounds for his objection strongly suggests that the applicant may be rationalizing his specific concerns about and dislike for unions in a university setting in terms of his religious beliefs, a conclusion, if reached, which would be analogous to the conclusion reached by the Board in its decision in the *University of Windsor*, [1979] OLRB Rep. May 458, at paragraph 9:

“... Rather it appears to the Board to be a case where the applicant has rationalized his general objections to trade unions in terms of his religious beliefs.”

21. As a result of the selective nature of the applicant’s objection to unions and the essentially secular nature of his particular objection to unions in a university setting, the Board is not convinced that his objection to paying union dues to the Association is tied to his belief in God, or to his reverence for or desire to please God. In these circumstances the Board is not satisfied that it is the applicant’s religious beliefs which prevent him from paying dues to the

Association. It follows, therefore, that the Board is not satisfied that the applicant's objection is caused by his religious beliefs.

22. For all of these reasons the application is dismissed.

#### **DECISION OF BOARD MEMBER J. D. BELL:**

1. I dissent.

2. Professor McEachran has a deep and conscientious objection to being required to support the York University Faculty Association. He stressed that to support a union, particularly at a university, would violate those things which he values most highly and most important to his life.

3. The sincerity of the applicant is referred to by the majority decision. Paragraph 2 states in part:

- (a) "There is no doubt, in the Board's view that the applicant has strong personal religious beliefs, sincerely held."

Also paragraph 19 states:

- (b) "The applicant in unquestionably of the view that all of his objection to paying dues to the Association are firmly grounded in his religious beliefs—".

4. The Board in *Hogeterp v. U.A.W.*, *supra*, stated at paragraph 11,

"The 'objection' referred to in section 39 (now section 47) of the Act need not be the sole objection or even the *primary* objection to membership in or support of a trade union. As long as an applicant has a *bona fide* objection because of his religious conviction or belief, he is entitled to the relief afforded by section 39 (now section 47) even if he holds an objection to membership in and support of a trade union because of some other ground".

5. As a member of the panel of the Board which arrived at this unanimous conclusion 10 years ago I believe it was a proper decision. The statement, "the objection referred to in section 39 of the Act need not be the sole objection or even the primary objection" has been referred to often and never considered to be obiter by the Board nor to my knowledge has anyone argued before the Board that it was. I do not agree with the panel of the Board that has now decided this statement is obiter — *Helen Sarah Freedhof, supra*.

6. I would grant the application.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD APRIL 1982

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**2049-81-R:** International Brotherhood of Painter & Allied Trades Local Union 1891, (Applicant) v. Mandic Bros. Drywall & Const. Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit)

**2104-81-R:** Retail Clerks Union, Local 409, (Applicant) v. United Security Limited, (Respondent).

Unit: "all of the employees of the respondent working at Thunder Bay, International Airport save and except manager, and persons above that rank". (10 employees in unit). (*Clarity Note*).

**2249-81-R:** Ontario Nurses' Association, (Applicant) v. Oakridge Villa Nursing Home, (Respondent).

Unit #1: "all registered and graduate nurses employed in nursing capacity by the respondent in Downsview, Ontario, save and except assistant director of nursing, persons above the rank of assistant director of nursing, and persons regularly employed for not more than twenty-four (24) hours per week". (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certified Subsequent to a Post-Hearing Vote*).

**2428-81-R:** Le Syndicat Canadien de la Fonction Publique, (Applicant) v. Le Patro d'Ottawa, (Respondent).

Unit: "tous les employés du Patro d'Ottawa, Ontario à l'exception du Directeur Général, du Coordonnateur des Programmes et Responsable du Personnel, de l'Adjoint au Coordonnateur des Programmes et Responsable du Personnel, du Contrôleur et de la secrétaire au Directeur Général." (41 employees in unit).

**2429-81-R:** Ontario Public Service Employees Union, (Applicant) v. The Muscular Dystrophy Association of Canada, (Respondent).

Unit: "all employees of the respondent in its national office in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, Executive Assistant, two (2) management secretaries, persons employed for not more than 24 hours per week and students employed during the school vacation period". (18 employees in unit). (*having Regard to the agreement of the parties*). (*Clarity Note*).

**2503-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 169, (Applicant) v. Reimer Overhead Doors Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

**2527-81-R:** Canadian Union of Public Employees, (Applicant) v. The Board of Governors of the University of Western Ontario, (Respondent).

Unit: "all employees of the respondent at the University of Western, Ontario, save and except head chefs/bakers, those above the rank of head chef/baker, office, clerical and technical staff, operating engineers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and those people covered by subsisting collective agreement". (369 employees in unit). (*Having regard to the agreement of the parties*).

**2562-81-R:** Ontario Nurses' Association, (Applicant) v. Brouillette Manor Limited, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Tecumseh, Ontario, save and except director of nursing and persons above the rank of director of nursing". (7 employees in unit). (*Having regard to the agreement of the parties*).

**2568-81-R:** United Steelworkers of America, (Applicant) v. Dynpac Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Pavemaster Division in the Town of Ajax, save and except foremen, persons above the rank of foreman, office and sales staff". (22 employees in unit). (*Having regard to the agreement of the parties*).

**2569-810R:** Ontario Public Service Employees Union, (Applicant) v. Tenant Hotline Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except lawyer". (6 employees in unit). (*Having regard to the agreement of the parties*).

**2570-81-R:** Local 636 of the International Brotherhood of Electrical Workers, (Applicant) v. The Hydro Electric Commission of the Town of Port Elgin, (Respondent).

Unit: "all employees of the respondent in the Town of Port Elgin, Ontario, save and except foremen, persons above the rank of foreman, office staff, and students employed during the school vacation period". (4 employees in unit). (*Having regard to the agreement of the parties*).

**2584-81-R:** Ontario Public Service Employees Union, (Applicant) v. Brant County Ambulance Service Limited, (Respondent).

Unit: "all employees of the respondent at Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (14 employees in unit). (*Having regard to the agreement of the parties*).

**2587-81R:** Christian Labour Association of Canada, (Applicant) v. Cross Country Concrete Ontario Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, save and except



foremen, persons above the rank of foreman, office and sales staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

**2588-81-R:** Canadian Union of Public Employees, (Applicant) v. Queen's Day Care Centre, (Respondent).

Unit: "all employees of the respondent in the City of Kingston and the County of Frontenac, save and except assistant directors, those persons above the rank of assistant director, and the administrative secretary". (22 employees in unit). (*Having regard to the agreement of the parties*).

**2604-81-R:** United Food & Commercial Workers International Union, Local 175, (Applicant) v. Belmont Meat Products Ltd., (Respondent).

Unit: "all employees of the respondent in its meat processing operation in Metropolitan Toronto, employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons covered by a subsisting collective agreement". (4 employees in unit). (*Having regard to the agreement of the parties*).

**2611-81-R:** Canadian Union of Public Employees, (Applicant) v. Thomas Toddlers Ltd., (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (30 employees in unit). (*Having regard to the agreement of the parties*).

**2612-81-R:** Ontario Public Service Employees Union, (Applicant) v. The Great War Memorial Hospital of Perth District, (Respondent).

Unit: "all office and clerical employees of the respondent at Perth, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, department heads, supervisors and persons above the rank of supervisor, and persons covered by subsisting collective agreement". (7 employees in unit). (*Having regard to the agreement of the parties*).

**2618-81-R:** Ontario Nurses' Association, (Applicant) v. Chelsey Park (Oxford), (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its nursing home in London, Ontario save and except the assistant director of resident care". (23 employees in unit). (*Having regard to the agreement of the parties*).

**2626-81-R:** Graphic Arts International Union, Local 542, (Applicant) v. Kerr-Progress Printing Limited, (Respondent).

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements with the Graphic Arts International Union Local 542 and the International Printing and Graphic Communications Union Local 95". (9 employees in unit). (*Having regard to the agreement of the parties*).

**2628-81-R:** Office & Professional Employees International Union, (Applicant) v. Thunder Bay Community Credit Union Inc., (Respondent).

Unit: "all office, clerical and technical employees of the respondent in Thunder Bay, save and except the treasurer-manager and a confidential secretary to the Board of Directors". (4 employees in unit). (*Having regard to the agreement of the parties*).

**2659-81-R:** Mississauga Stainless Steelworkers' Association, (Applicant) v. Tri-Canada Inc., (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and those persons covered by subsisting collective agreements". (59 employees in unit). (*Having regard to the agreement of the parties*).

**2667-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Fulcon Contractors Incorporated, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman".

Unit #2: "all construction labourers in the employ of the respondent in Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

**2668-81-R:** Teamsters Local union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 305459 Ontario Limited, carrying on business as Reliable Food Supplies, (Respondent).

Unit: "all employees of the respondent working at and out of its warehouse in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

**2672-81-R:** Graphic Arts International Union, Local 542, (Applicant) v. Fashion Screen Print Ltd., (Respondent).

Unit: "all employees of the respondent at its plant at 126 Bruce Street, in the City of Brantford, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (14 employees in unit). (*Having regard to the agreement of the parties*).

**2675-81R:** International Union of Operating Engineers, Local 793, (Applicant) v. 464734 Ontario Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic township of Nassagaweya, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

**2676-81-R:** International Brotherhood of Electrical Workers Local Union 1687, (Applicant) v. Star Delta Electric Limited, (Respondent).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

**2690-81-R:** Labourers' International Union of North America, Local 837, (Applicant) v. Delmar Contracting Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in The Regional Municipality of Niagara and that portion of Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit)

**2693-81-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. E. G. & Sons Drywall Company, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

**2695-81-R:** Canadian Union of Public Employees, (Applicant) v. Peel Board of Education, (Respondent).

Unit: "all custodial and maintenance employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant supervisors or foremen, persons above the rank of assistant supervisor or foreman, and persons covered by a subsisting collective agreement". (371 employees in unit). (*Having regard to the agreement of the parties*).

**2713-81-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Maple Leaf Mills Limited, (Respondent).

Unit: "all employees of the respondent at Guelph, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff". (48 employees in unit). (*Having regard to the agreement of the parties*).

**2716-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Philipchuk & Poate Const. Co. Ltd. operating under the name of Philipchuk Construction Co. Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and



except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in The District of Kenora including the Patricia Portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

**2728-81-R:** Canadian Union of Public Employees, (Applicant) v. The Brantford Public Library Board, (Respondent).

Unit: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, secretary to the chief librarian, pages and students participating in a co-operative work/study program". (10 employees in unit). (*Having regard to the agreement of the parties*).

**0014-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moira-Schuster Fuels Division of Ultramar Canada Inc., (Respondent) v. Moira Schuster Employee's Association, (Intervener).

Unit: "all employees of the respondent at Belleville and Trenton, Ontario, save and except foreman, persons above the rank of foreman, dispatchers, office and sales staff". (8 employees in unit). (*Having regard to the agreement of the parties*).

**0023-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, (Applicant) v. Richard D. Steele Construction (1979) Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in The geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

**0029-82-R:** United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. F. G. Bradley Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, security staff, office and sales staff, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreement". (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0031-82-R:** Canadian Transportation Workers Union #188, National Council of Canadian Labour (Applicant) v. Hyde Park Transport Inc., (Respondent).

Unit: "all employees of the respondent working in or out of the City of London, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office staff and persons regularly employed for not more than 24 hours per week". (3 employees in unit). (*Having regard to the agreement of the parties*).

**0045-82-R:** Professional & Clerical Workers of Canada, (Applicant) v. The Canadian Union of Operating Engineers and General Workers Local 111, (Respondent).

Unit: "all employees of the respondent in the City of Vanier, Ontario, save and except the elected executive". (3 employees in unit). (*Having regard to the agreement of the parties*).

**0056-82-R:** Canadian Union of Public Employees, (Applicant) v. The Grove — Arnprior & District Nursing Home, (Respondent).

Unit #1: “all employees of the respondent in the Town of Arnprior, save and except department heads, persons above the rank of department head, registered nurses, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period”. (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the Town of Arnprior regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department heads, registered nurses and office staff”. (4 employees in unit). (*Having regard to the agreement of the parties*).

**0081-82-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. Brost Holdings (No2) Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (5 employees in unit).

Unit #2: “all construction labourers in the employ of the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (5 employees in unit).

**0125-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Morningstar Carpenter, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (7 employees in unit).

**0126-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Lazio Carpentry, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

**0127-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. P.S. Carpentry, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

**0128-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. T. and F. General Contractors, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in The Municipality of

Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1040-81-R:** Graphics Arts International Union, Local 211 Toronto, Ontario, (Applicant) v. Metroland Printing & Publishing Ltd., (Respondent).

Unit: "all employees of the respondent, employed in the composing rooms at its plant in Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	58
Number of persons who cast ballots	56
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	24

**2491-81-R:** United Steelworkers of America, (Applicant) v. Montebello Metal Inc., (Respondent) v. Hawkesbury Metal Workers Association, (Intervener).

Unit: "all employees of the respondent at Hawkesbury, Ontario, save and except foremen, floorladies, persons above the rank of foreman and floorlady, office and sales staff and students hired for the school vacation period". (144 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	143
Number of persons who cast ballots	136
Number of ballots marked in favour of applicant	93
Number of ballots marked against applicant	43

**2498-81-R:** Canadian Paperworkers Union, (Applicant) v. Abitibi-Price Inc., (Respondent) v. International Association of Machinists & Aerospace Workers, Local No. 1371, (Intervener #1) v. The Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Intervener #2).

Unit: "all employees of the respondent at its Iroquois Falls Division, save and except foremen, persons above the rank of foreman, office and sales staff, and persons covered by subsisting collective agreements (other than the subsisting collective agreement between the respondent and intervener #1)". (44 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared	44
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	30
Number of ballots marked in favour of intervener #1	12

**2504-81-R:** Service Employees Union, Local 204, affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. The Etobicoke General Hospital, (Respondent).

Unit: "all employees of the respondent in Rexdale, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, registered and graduate nursing staff, paramedical employees, office and clerical staff, security guards and persons covered by subsisting collective agreements". (157 employees in unit). (*Having regard to the agreement of the parties*).



Number of names of persons on list as originally prepared by employer	157
Number of names of persons on revised voters' list	136
Number of persons who cast ballots	82
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	24

**2526-81-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Windsor Machine & Stamping Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff". (46 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	46
Number of persons who cast ballots	45
Number of spoiled ballots	01
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	19

**2534-81-R:** Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Oakridge Villa Nursing Home, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-two and one-half (22½) hours per week and students employed during a school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nursing staff, office staff and persons covered by subsisting collective agreements". (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	29
Number of names of persons on revised voters' list	37
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	00
Ballots segregated and not counted	05

## Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**2249-81-R:** Ontario Nurses' Association, (Applicant) v. Oakridge Villa Nursing Home, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in Downsview, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except assistant director of nursing and persons above the rank of assistant director of nursing". (16 employees in unit). (*Having regard to the agreement of the parties*).

**2528-81-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cummings Sings of Canada Ltd., (Respondent) v. Group of Employees, (Intervener).

Unit: "all employees of the respondent working in Brampton, save and except foremen, persons above the rank of foreman, office and sales staff". (42 employees in unit). (*Having regard to the agreement of the parties*).

### Applications for Certification Dismissed — No Vote Conducted

**1739-81-R:** Labourers' International Union of North America, Local 506, (Applicant) v. North American Canadian Developments Ltd. carrying on business as N. A. Construction, (Respondent) v. Group of Employees, (Objectors).

**1792-81-R:** Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, (Applicant) v. Charterways Transportation Limited, (Respondent) v. Group of Employees, (Objectors).

**2410-81-R:** Canadian Union of Public Employees, (Applicant) v. John Palangio Enterprises Limited Corporate No. 75918 carrying on business as Deluxe Coach Lines, (Respondent).

**2729-81-R:** Canadian Union of Public Employees, (Applicant) v. People Care Centres Inc., (Respondent) v. Group of Employees, (Objectors).

**0040-82-R:** The Canadian Union of Educational Workers, (Applicant) v. Queen's University, (Respondent).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2381-81-R:** International Union of Allied Novelty and Production Workers, Local 590, (Applicant) v. Central Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at its hospital in Metropolitan Toronto save and except Supervisors, persons above the rank of Supervisor, Administrative Assistants to the Executive Director, the Administrator, the Assistant Administrators and the Personnel Director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods". (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	33
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	29

**2493-81-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Lorenzo A & S Limited, (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 598, (Intervener).

Unit: "all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen, apprentice cement masons, and waterproofers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, and persons above the rank of non-working foreman". (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	2

## Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1648-81-R:** United Steelworkers of America, (Applicant) v. Aluminart Products Limited, Extrusion Division, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in the Town of Halton Hill, save and except foremen, person above the rank of foreman, office and sales staff". (18 employees in unit).

**1740-81-R:** Local Union 2228, International Brotherhood of Electrical Workers, (Applicant) v. Filtran Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (120 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	123
Number of persons who cast ballots	106
Number of spoiled ballots	01
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	53

**2345-81-R:** International Union of Operating Engineers and Local 793, (Applicant) v. Sault Uneeda Cab Service Limited, (Respondent).

Unit: "all employees of the respondent working at and out of Sault Ste. Marie, Ontario, save and except supervisors, and persons above the rank of supervisor". (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	18
Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	12

**2350-81-R:** International Leather Goods, Plastic & Novelty Workers' Union, Local 8, (Applicant) v. Hardman Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office staff, sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (59 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	43
Number of spoiled ballots	01
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	28

**2373-81-R:** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Craftwell Containers & Packaging Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff". (21 employees in unit). (*Having regard to the agreement of the parties*).



Number of names of persons on list as originally prepared by employer	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	07
Number of ballots marked against applicant	13

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1863-81U:** United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Ltd., (Respondent) v. International Brotherhood of Painters and Allied Trades, Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local Union 1904, (Intervener).

**2015-81-R:** Shopmen's Local Union No. 843 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Applicant) v. Welded Grating Limited, (Respondent).

**2545-81-R:** Canadian Union of Public Employees, (Applicant) v. Borough of York, (Respondent).

**2669-81-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. C. Davison Fuels Ltd., (Respondent).

**2700-81-R:** Amalgamated Clothing and Textile Workers Union-Toronto Joint Board, (Applicant) v. Valley Slacks Limited, (Respondent).

**2742-81-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. R.P.A. Construction Limited (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

**0013-82-R:** Office and Professional Employees International Union, (Applicant) v. Cuna of Ontario Credit Union Limited, (Respondent).

**0084-82-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757, Thunder Bay, of the Hotel Employees and Restaurant Employees International Union, A.F.L.,-C.L.C., (Applicant) v. Shoreline Motor Hotel, Ron Scott Inc., (Respondent).

**0123-82-R:** Laborers' International Union of North America, Local 607, (Applicant) v. Stead & Lindstrom (1977) Limited, (Respondent).

**0145-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1316, (Applicant) v. Paul Tremblay Contracting Limited, (Respondent).

**0147-82-R:** United Steelworkers of America, (Applicant) v. Metric Concrete Limited, (Respondent).

## SALE OF A BUSINESS

**0607-81-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. The Charming Hostess Inc., Amsterdam Catering Services Limited, and Molson's Brewery (Ontario) Limited, (Respondents). (*Dismissed*).

**1475-81-R; 1476-81-R; 1477-81-R; 1478-81-R:** Ottawa Typographical Union, Local 102, (Applicant) v. The Winchester Press Limited, 2Womor Publications Inc., Winchester Print (1981) Inc., Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print, (Respondent). (*Granted*).

**2329-81-R:** Slau Limited, (Applicant) v. Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Respondent). (*Dismissed*).

## UNION SUCCESSOR RIGHTS

**1913-81-R:** Ontario Nurses' Association, (Applicant) v. Sudbury and District Health Unit, (Respondent). (*Granted*).

**1914-81-R:** Ontario Nurses' Association, (Applicant) v. The Board of Health of Niagara Region Health Unit, (Respondent). (*Granted*).

**1915-81-R:** Ontario Nurses' Association, (Applicant) v. Hamilton-Wentworth Regional Health Unit, (Respondent). (*Granted*).

**2307-81-R:** Ontario Nurses' Association, (Applicant) v. Regional Municipality of Niagara, (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1309-81-R:** Leonard Kitchen, (Applicant) v. United Food and Commercial Workers International Union and its Local 417, (Respondent) v. Beatrice Foods (Ontario) Limited Malcolm Condensing Company Division, (Intervener). (*Dismissed*).

**1687-81-R:** Dennis Martin, (Applicant) v. Hotel & Restaurant Employees Union Local 756, (Respondent).

Unit: "all full-time employees of the intervener in the following categories: bartenders, busboys, girls, cashiers, doormen and waiters/waitresses". (*Granted*).

Number of names of persons on list as originally prepared by employer	16
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	00
Number of ballots marked against respondent	16

**2332-81-R:** Joe Levy, Ed Rusa, G. Jesso, (Applicants) v. Canadian Union of Operating Engineers & General Workers, (Respondent) v. Markborough Properties Ltd., (Intervener).

Unit: "all employees at 7 Overlea Blvd., Toronto, save and except foremen and persons above the rank of foreman". (*Granted*).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

**2379-81-R:** Casey Burgler, (Applicant) v. Teamsters Union Local 419, (Respondent) v. Air Products, Division of Catalytic Enterprises Limited, (Intervener).

Unit: "all employees of the intervener employed at Brampton, Ontario, save and except foremen,

persons above the rank of foreman, customer station mechanics, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (*Granted*).

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	9

**2499-81-R:** 396009 Ont. Ltd. o.a. Greenfield Electric, (Applicant) v. Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Respondent). (*Dismissed*).

**2589-81-R:** Walter Burt, (Applicant) v. The International Brotherhood of Painters and Allied Trades Local Union #114 and the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Respondent). (*Withdrawn*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**2348-81-M:** Slau Limited, (Applicant) v. Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Respondent). (*Dismissed*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

**0049-82-U:** The National Home Show, (Applicant) v. Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America and its Local 675 and Fred Leach, (Respondent). (*Withdrawn*).

**0051-82-U:** Lummus Canada Inc., (Applicant) v. Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, and its Local 1425, David Stewart, Roland Pelletier, et al (see Schedule "A" hereto), (Respondents). (*Granted*).

**0076-82-U:** Wharton Industrial Developments Ltd., (Applicant) v. International Brotherhood of Painters and Allied Trades, District Council 46; International Brotherhood of Painters and Allied Trades, Local 1891; Len Anderson; Armando Colafrencesci and Sergio Pantarotto, (Respondents). (*Dismissed*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0531-81-U:** The Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail, (Respondent). (*Withdrawn*).

**1329-81-U:** Leonard Kitchen, (Complainant) v. United Food and Commercial Workers International Union and its Local 417, Donald Dayman, Devin Corporon, Gary Haycock, Arit Miller, Steve Gibbs, Beth Gibbs, Gerald Rochleau, Allen Rosburgh, (Respondents) v. Beatrice Foods (Ontario) Limited Malcolm Condensing Company Division, (Intervener). (*Dismissed*).

**1641-81-U:** Raphael A. Julien, (Complainant) v. Local 46 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Ontario Hydro, (Respondents). (*Dismissed*).



**1714-81-U:** United Steelworkers of America, (Complainant) v. Aluminart Products Limited, Extrusion Division, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

**1884-81-U:** Remi Belanger, (Complainant) v. International Association of Machinists and Aerospace Workers, Local 268, (Respondent) v. Court Industries Co. Ltd., (Intervener). (*Dismissed*).

**1917-81-U:** Ontario Nurses' Association, (Complainant) v. Sudbury and District Health Unit, (Respondent). (*Dismissed*).

**1918-81-U:** Ontario Nurses' Association, (Complainant) v. The Board of Health of Niagara Regional Health Unit, (Respondent). (*Dismissed*).

**1919-81-U:** Ontario Nurses' Association, (Complainant) v. Hamilton-Wentworth Regional Health unit, (Respondent). (*Dismissed*).

**1943-81-U:** Mechanical Contractors Association of Sarnia, (Complainant) v. Mechanical Contractors Association of Ontario, (Respondent) v. Industrial Contractors Association of Canada, (Intervener). (*Non-Compliance — Dismissed*).

**1981-81-U:** United Steelworkers of America, (Complainant) v. C. H. Heist (Canada) Limited, International Brotherhood of Painters and Allied Trades, Local Union 904, Joe Bergeret, (Respondent). (*Withdrawn*).

**2137-81-U:** United Steelworkers of America, (Complainant) v. Rheem Canada Inc., (Respondent). (*Dismissed*).

**2150-81-U:** R. Maureen Mullen, (Complainant) v. UAW Duplate Bargaining Committee, (Respondent). (*Withdrawn*).

**2273-81-U:** International Woodworkers of America, (Complainant) v. Laurentian Wood Inc., (Respondent). (*Granted*).

**2308-81-U:** Ontario Nurses' Association, (Complainant) v. Regional Municipality of Niagara, (Respondent). (*Dismissed*).

**2406-81-U:** William Egan, (Complainant) v. David Cairns, (Respondent). (*Dismissed*).

**2408-81-U:** William Egan, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local 1590 and Ronald Last, (Respondent). (*Dismissed*).

**2467-81-U:** Service Employees' Union, Local 204 affiliated with A.F. of L.; C.I.O., C.L.C., (Complainant) v. Resortland Hotels Ltd., c.o.b. as Anndore Hotel, (Respondent). (*Withdrawn*).

**2482-81-U:** International Association of Machinists & Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Withdrawn*).

**2497-81-U:** Arbutovich Mark, (Complainant) v. Canadian Paperworkers Union, Local #67, (Respondent). (*Withdrawn*).

**2525-81-U:** Ontario Public Service Employees Union, (Complainant) v. The Muscular Dystrophy Association of Canada, (Respondent). (*Dismissed*).

**2531-81-U:** Office and Professional Employees International Union, (Complainant) v. Union Du Canada Assurance-Vie, (Respondent). (*Granted*).

**2540-81-U:** Emil Larochelle, (Complainant) v. John Palangio Enterprises Ltd., (Respondent). (*Withdrawn*).

**2554-81-U:** Retail, Commercial and Industrial Union Local 206 chartered by the United Food and Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Complainant) v. Coulters Market, (Respondent). (*Withdrawn*).

**2559-81-U:** International Association of Machinists & Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Withdrawn*).

**2577-81-U:** Alexander Faulds, (Complainant) v. McDonell Douglas, (Respondent). (*Withdrawn*).

**2592-81-U:** Canadian Union of Public Employees, (Complainant) v. Villa Colombo Homes for the Aged Inc., (Respondent). (*Withdrawn*).

**2596-81-U:** Ontario Public Service Employees Union, (Complainant) v. Tenant Hotline Inc., (Respondent). (*Withdrawn*).

**2605-81-U:** Ernest G. Moore Acting Agent for Native Sector of Lecours Bargaining Unit, (Complainant) v. Lumber & Sawmill Worker's Union Local Office 2995, Kapuskasing, Ontario, (Respondent). (*Withdrawn*).

**2647-81-U:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union 352, affiliated with the International Brotherhood of Teamsters', Chauffeurs, Warehousement and Helpers of America, (Complainant) v. Webpax A Division of Canadian Cannors Limited, (Respondent). (*Withdrawn*).

**2665-81-U:** Health, Office & Professional Employees, a division of Retail Commercial & Industrial Union, Local 206, (Complainant) v. Green Acres Nursing Home, (Respondent). (*Withdrawn*).

**2674-81-U:** Service Employees International Union, Local 183, (Complainant) v. Plainfield Children's Home, (Respondent). (*Withdrawn*).

**2691-81-U:** Ontario Public Service Employees Union, (Complainant). v. The Ontario College of Art, (Respondent). (*Withdrawn*).

**2703-81-U:** Health, Office & Professional Employees, Local 206, a division of Retail, Commercial & Industrial Union, (Complainant) v. Green Acres Nursing Home, (Respondent) (*Withdrawn*).

**2710-81-U:** Diane Dubee, (Complainant) v. Union UAW Local 1915, (Respondent). (*Withdrawn*).

**2715-81-U:** Alphanso Reid, (Complainant) v. United Steelworkers of America, Local 2461, (Respondent). (*Withdrawn*).

**2730-81-U:** Barbra Buick, (Complainant) v. Mark Coady Domed Stadium Tavern, (Respondent). (*Withdrawn*).

**2732-81-U:** Barry Rolph and Donald R. Elliott, (Complainants) v. Retail, Commercial & Industrial Union, United Food & Commercial Workers International Union and Loblaw's Limited, (Respondents). (*Withdrawn*).

**2743-81-U:** Health, Office & Professional Employees, Local 206, a division of Retail, Commercial & Industrial Union, (Complainant) v. Green Acres Nursing Home, (Respondent). (*Withdrawn*).

**0007-82-U:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Triangle Insulation (Respondent). (*Withdrawn*).

**0022-82-U:** United Steelworkers of America, (Complainant) v. Mobile Materials Handling Equipment Limited, (Respondent). (*Withdrawn*).

**0027-82-U:** Tina Roma, (Complainant) v. United Steelworkers of America Local Union 14831, (Respondent). (*Withdrawn*).

**0033-82-U:** The Schneider Employees' Association, (Complainant) v. J. M. Schneider Inc., (Respondent). (*Withdrawn*).

**0038-82-U:** Margaret Baird, (Complainant) v. A. E. Long Co. & Energy & Chemical Workers Union (Local 620), (Respondent). (*Withdrawn*).

**0039-82-U:** Mechanical Contractors Association of Sarnia, (Complainant) v. Mechanical Contractors Association of Ontario, (Respondent). (*Dismissed*).

**0064-82-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. M & O Buslines (Handicab) Ltd., (Respondent). (*Withdrawn*),

**0079-82-U:** Esmond Dawdy, (Complainant) v. Canadian Brotherhood of Railway Transport & General Workers (CBRT & GW), (Respondent). (*Withdrawn*).

**0091-82-U:** Ontario Public Service Employees Union, (Complainant) v. Canadian Medical Laboratories Ltd., (Respondent). (*Withdrawn*).

**0110-82-U:** Robert J. Holley & Others, (Complainant) v. Leo J. Grandbois-Pres. Local 582, Retail, Wholesale & Department Store Union-AFL:CIO:CLC, (Respondent). (*Withdrawn*).

**0139-82-U:** United Food and Commercial Workers International Union Local 1000A, (Complainant) v. Tops Food Market and Joseph Chetti, (Respondents). (*Granted*).

## **APPLICATIONS FOR CONSENT TO PROSECUTE**

**2734-81-U:** Service Employees' International Union, Local 183, (Applicant) v. Plainfield Children's Home, Fred Brooks, D.D.B. Allan, P. Richard, William Lavery, C.G. Long, May Hambly, Clara Adams, Agnes Gordon, Earl Gordon, A. Jamieson, B. Knudsen, J.L. Lavery, E. Leuty, G. A. Priest, L. Ptolemy, A. Bruce-Robertson, K. Bruce-Robertson, C. Vader, C.A. Woods, and C. Mercer, (Respondents). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2455-81-M:** Nitrochem Inc., (Employer) v. Energy & Chemical Workers Union, Local 33, (Trade Union). (*Granted*).

**0016-82-M:** Consolidated-Bathurst Packing Limited, (Employer) v. Canadian Union of Operating Engineers and General Workers, Local 100, (Trade Union). (*Granted*).



## FINANCIAL STATEMENT

**2155-81-M:** Albert M. Choy, (Complainant) v. Local 242, American Federation of Grain Millers, A.F.L.-C.I.O.-C.L.C., (Respondent). (*Dismissed*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1757-81-M:** Ottawa Civic Hospital, (Applicant) v. Ontario Nurses' Association, Local 90, (Respondent). (*Granted*).

**2045-81-M:** Town of Ancaster, (Applicant) v. Canadian Union of Public Employees, Local 2064, (Respondent). (*Dismissed*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2096-81-OH:** Mr. Anthony Frangis, (Complainant) v. Refinery Management Imperial Oil Ltd. Sarnia Refinery Sarnia, Ontario, (Respondent). (*Granted*).

**2709-81-OH:** Mr. Terry Turner, (Complainant) v. Bachan Aerospace of Canada Ltd., (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**1635-80-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, (Applicant) v. Twin City Plumbing and Heating and Groff Plumbing & Heating Limited, (Respondents). (*Dismissed*).

**0796-81-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Lewis Insulation Services Inc., (Respondent) v. The Master Insulators' Association of Ontario, Incorporated, (Intervener). (*Granted*).

**1536-81-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Butera Const. Ltd., (Respondent). (*Granted*).

**2083-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Loaring Construction Company Limited, (Respondent). (*Withdrawn*).

**2095-81M:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. G. Lavioitoe and Brothers Ltd., (Respondent). (*Dismissed*).

**2160-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Silva Masonry, (Respondent). (*Withdrawn*).

**2237-81-M:** Local Union 1190, (Applicant) v. L I S Construction Co. Ltd., (Respondent). (*Granted*).

**2275-81-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cana Industrial Contractors Ltd., (Respondent). (*Withdrawn*).

**2391-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 92, and Local 2041, (Applicants) v. T.O.B. Construction Limited, (Respondent). (*Withdrawn*).

**2415-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Pipe Line Contractors Association and its Affiliate Majestic Wiley Contractors Limited, (Respondent). (*Withdrawn*).

**2489-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Lanor Niagara Limited, (Respondent). (*Withdrawn*).

**2500-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Majestic Wiley Contractors Limited, (Respondent). (*Withdrawn*).

**2501-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. O. J. Pipelines Ltd., (Respondent). (*Withdrawn*).

**2599-81-M:** Sheet Metal Workers' International Association Local Union No. 537, (Applicant) v. Duman Limited, (Respondent). (*Granted*).

**2632-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Roman Plastering & Acoustical Co., (Respondent). (*Granted*).

**2642-81-M:** The Ontario Pipe Trades Council and The United Association, Local 508, (Applicant) v. W. A. Stevenson Construction Co. Limited, (Respondent). (*Granted*).

**2666-81-M:** Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. John Strathern Contracting, (Respondent). (*Withdrawn*).

**2678-81-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

**2679-81-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Silva Masonry, (Respondent). (*Granted*).

**2689-81-M:** Labourers' International Union of North America, Local 607, (Applicant) v. Comstock International Ltd./Contractors, (Respondent). (*Withdrawn*).

**2697-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ranade Development Limited, (Respondent). (*Withdrawn*).

**2701-81-M:** Labourer's International Union of North America, Local 183, (Applicant) v. Sub-Terra Utility Construction Ltd., (Respondent). (*Granted*).

**2704-81-M:** International Association of Bridge, Structural and Ornamental Iron Workers Local No. 721, (Applicant) v. 367108 Ontario Limited carrying on business as North Steel Erectors, (Respondent). (*Granted*).

**2719-81-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Acadian Acoustics Co. Limited, (Respondent). (*Withdrawn*).

**2720-81-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 47834 Ontario Limited, carrying on business as R.C. Acoustics and Drywall, (Respondent). (*Withdrawn*).

**2721-81-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 396039 Ontario Limited, carrying on business as Emcan Interior Systems, (Respondent). (*Withdrawn*).

**2722-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*).

**2723-81-M; 2724-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its affiliate Dufresne Piling Company (1967) Ltd., (Respondent). (*Granted*).

**2739-81-M:** Labourers' International Union of North America, Local Union No. 597, (Applicant) v. Huffman Construction Limited, (Respondent). (*Withdrawn*).

**0002-82-M:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Lodge 128, (Applicant) v. Magna Flux Quality Services, (Respondent). (*Withdrawn*).

**0004-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Ridgewood Insulation Limited, (Respondent). (*Withdrawn*).

**0008-32-M; 0009-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

**0036-82-M:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. C & D Plastering Limited, (Respondent). (*Withdrawn*).

**0037-82-M:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 1988, (Applicant) v. Berkim Construction Ltd., (Respondent). (*Granted*).

**0059-82-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. Hespeler Concrete Floors Ltd., (Respondent). (*Granted*).

**0061-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800, (Applicant) v. Comstock International Limited The Mechanical Contractors Association of Sudbury, (Respondent). (*Withdrawn*).

**0062-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Par-Tex Engineering and Contracting Co. Ltd., (Respondent). (*Withdrawn*).

**0067-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lualco Steel Erection & Mechanical Services Ltd., (Respondent). (*Withdrawn*).

**0068-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lackie Brother Limited, (Respondent). (*Withdrawn*).

**0069-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Barnett Barnett-McQueen Construction Ltd., (Respondent). (*Withdrawn*).



**0070-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

**0071-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Acco-Canadian Material Handling Group, (Respondent). (*Withdrawn*).

**0073-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Rudy's Metal Work, (Respondent). (*Withdrawn*).

**0074-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Rack Erectors Ltd., (*Withdrawn*).

**0103-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Edilu Technical & Engineering Services Limited, (Respondent). (*Withdrawn*).

**0106-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Coolbreeze Service Limited, (Respondent). (*Withdrawn*).

**0133-82-M:** United Brotherhood of Carpenters and Joiners of America Local Union 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0686-81-JD:** Harold R. Stark Company Limited, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Labourers' International Union of North America, Ontario Provincial District Council, A Council of Trade Unions for Teamsters Local 230, and Labourers' Union, Local 597, (Respondents) v. Oshawa Paving Ltd., Oshawa Area Signatory Contractors, (Intervener). (*Denied*).

**2543-81-R:** Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, Division of Ruggles Sales and Service Ltd., (Respondent). (*Denied*).

**2690-81-R:** Labourers' International Union of North America, Local 837, (Applicant) v. Delmar Contracting Ltd., (Respondent). (*Dismissed*).



*Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario*

ISSN 0383-4778







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# Decisions

## June 82

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

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Selected decisions of particular reference value are  
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**0305-82-R** Retail, Wholesale and Department Store Union,  
AFL:CIO:CLC:, Applicant, v. **Beatrice Foods (Ontario) Limited**,  
Respondent, v. Model Dairy Workers Union, Intervener

**Practice and Procedure – Reconsideration – Request to include “Model Dairy Division” in employer name in Board records refused – Board preferring policy of including corporate name only in style of cause – Restriction of bargaining rights to be achieved by reference to division in unit description**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**DECISION OF THE BOARD;** June 16, 1982

1. In a decision dated May 31, 1982 in this application for certification, the Board directed that a representation vote be taken of the employees of the respondent in the following bargaining unit:

“all employees of the respondent in its Model Dairy Division at Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods, and persons covered by a subsisting collective agreement.”

In paragraph 1 of that decision, the Board substituted “Beatrice Foods (Ontario) Limited” for “Model Dairy (Division of Beatrice Foods)” as the name of the respondent in the style of cause of this application.

2. Upon receipt of that decision, a representative of the respondent forwarded the following letter to the Board:

“We acknowledge receipt of the Ontario Labour Relations Board decision in the above matter dated May 31, 1982.

We wish to draw to your attention an error in paragraph number 1 with respect to the name of the employer.

In the Reply to Application for Certification, the respondent stated the correct name as ‘Beatrice Foods (Ontario) Limited, Model Dairy Division.’

At the meeting with the Board Officer on May 28, 1982, the name of the respondent was amended accordingly.

In the Board’s decision, it has omitted in error the words ‘Model Dairy Division’.

We ask that the records be amended to include the full, correct name of the respondent.”



3. Having considered the respondent's request, the Board is of the view that it would not be appropriate to amend the style of cause in the manner requested by the respondent. While a corporation may be subdivided into a number of divisions for operational, marketing and other purposes, the creation of such internal divisions does not change the fact that the legal entity which is the employer remains the corporation itself, which must have "Limited", "Incorporated", "Corporation", "Ltd.", "Inc." or "Corp." as the last word in its name (see *Business Corporations Act*, R.S.O. 1980, c. 54, s. 8, and *Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 25). To forestall various difficulties that might otherwise arise with respect to such matters as enforcement of Board decisions and orders, it is preferable (although it has not, to date, been the Board's unvarying practice) to include only the corporate name of an (incorporated) employer in the style of cause of an application or complaint. If, as in the present case, it is appropriate to restrict the applicant's bargaining rights to employees who work in a particular division that has been established by their corporate employer, this can be accomplished by referring to that division in the description of the bargaining unit, as was done in the aforementioned decision dated May 31, 1982 in which the unit was described as "all employees of the respondent *in its Model Dairy Division* at Sault Ste. Marie..." (emphasis added).

4. Therefore, the respondent's request for reconsideration and variance of the Board's decision dated May 31, 1982 in this matter is hereby dismissed.

## **2615-81-R John D. Weed, Applicant, v. Local #419 Teamsters, Respondent, v. Browning — Ferris Industries, Intervener**

**Petition – Practice and Procedure – Termination – Termination petition signed by not less than 45 percent of unit employees – Whether mandatory that Board direct vote – Whether counter-petitions irrelevant in termination applications**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members W.H. Wightman and S. Cooke.

**APPEARANCES:** John D. Weed on his own behalf; Ken Petryshen and Bud Bodkin for the respondent; R. A. Werry for the intervener.

**DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER S. COOKE; June 14, 1982**

1. The applicant has applied under section 57 of the *Labour Relations Act* for a declaration that the respondent union no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. The applicant, Mr. John D. Weed, filed a timely statement of desire in opposition to the union bearing the signatures of 20 out of the 36 employees in the bargaining unit. The petition, therefore, bears a sufficient number of signatures to cause the Board to conclude that not less than forty-five per cent of the employees in the bargaining unit signed the document.

3. A second and subsequent statement of desire or counter-petition was also filed with the Board. Through this document which bears the names of 28 of the 36 employees in the bargaining unit, the signatories purport to re-affirm their support for the trade union. The preamble to the document reads as follows:

WE, THE UNDERSIGNED EMPLOYEES OF BROWNING — FERRIS INDUSTRIES LTD., HEREBY SIGNIFY THAT WE *DO WISH* TO BE REPRESENTED BY THE TEAMSTERS LOCAL UNION NO. 419 OUR BARGAINING AGENT, AND WE WISH TO RE-AFFIRM OUR MEMBERSHIP IN TEAMSTERS LOCAL UNION NO. 419.

This re-affirmation document was circulated between March 24th and March 26, 1982. March 29, 1982 was the terminal date. The terminal date is the date set by the Board pursuant to section 103(2)(j) of the Act as the date by which evidence of signification from employees that they no longer wish to be represented by a trade union must be presented to the Board on an application for a declaration terminating bargaining rights. The document of re-affirmation contains the names of twelve persons who had earlier affixed their signatures to the original statement of desire in opposition to the trade union.

4. At the commencement of the hearing counsel for the union stated that he was not challenging the voluntariness of the statement of desire filed in opposition to the union. He accepted that the signatures on that statement of desire were affixed voluntarily. In light of the union's admission relating to the voluntariness of the applicant's statement of desire, the applicant stated he did not wish to call evidence in support of his application notwithstanding that the union proposed to call evidence to establish the voluntariness of its counter-petition.

5. Both the applicant and counsel for the company maintain that a counter-petition or re-affirmation document filed in support of a trade union is irrelevant and without effect on a termination application. They maintain that once the Board concludes that not less than forty-five per cent of the employees in a bargaining unit have voluntarily signed a statement of desire in opposition to a trade union by the terminal date set by the Board, the Board is obligated under section 57(3) of the Act to order the taking of a representation vote. They argue that the Board must order the vote whether or not there is also filed with the Board a subsequent voluntary counter-petition document containing a significant number of signatures of persons who had earlier signed the statement of desire in opposition to the trade union. Section 57(3) of the Act provides as follows:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing *at such time as is determined under clause 103(2)(j)* [the terminal date] that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board *shall*, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

[emphasis added]

Counsel for the company focused on the word “shall” in section 57(3), arguing that the Board is without discretion to decline to order a representation vote once it is satisfied that not less than 45 per cent of the employees in the bargaining unit, by the terminal date, have voluntarily signified in writing that they no longer want to be represented by the trade union.

6. In assessing the position taken by the applicant and employer, a comparison may be drawn between section 7(2) of the Act relating to the disposition of applications for certification and section 57(3) relating to applications for the termination of bargaining rights. Section 7(2) provides as follows:

If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board *may* direct that a representation vote be taken.

[emphasis added]

Counsel for the company did not dispute the relevance on an application for certification of documents of revocation or re-affirmation of union support obtained subsequent to a statement of desire filed in opposition to the trade union. On an application for certification the voluntariness of a numerically relevant statement of desire in opposition to the trade union is regularly considered by the Board in deciding whether to exercise the Board’s discretion and order the taking of a representation vote notwithstanding that the union has membership support from more than 55 per cent of the employees in the bargaining unit. Consideration of a numerically relevant subsequent counter-petition or document of re-affirmation of union support is further viewed by the Board as critical to the exercise of the Board’s discretion under section 7(2) of the Act.

7. In contrast to the certification situation, counsel for the company argues that on a termination application the Board is without discretion and must order the taking of a representation vote once it has before it a voluntary statement of desire in opposition to the trade union from not less than 45 per cent of the employees in the bargaining unit. Accordingly, he argues, a counter-petition or revocation document is completely irrelevant on an application for termination.

8. Counsel for the union views the operation of section 57(3) of the Act differently. He argues that the section directs the Board to assess the evidence of opposition to the trade union *as at* the terminal date. Accordingly, he maintains, even if not less than 45 per cent of the employees in a bargaining unit have voluntarily signed a document in opposition to the trade union by the terminal date, if a sufficient number of the same people subsequently sign a document revoking their signatures on the earlier statement of desire and re-affirm their support for the trade union then, depending on the degree of overlap, the Board may conclude that *as at* the terminal date, *less* rather than *not less*, than 45 per cent of the employees had voluntarily signified in writing that they no longer wanted to be represented by the trade union. Counsel emphasized that in determining the level of opposition to the trade union the Board focuses on the terminal date and has traditionally considered the last voluntary document prior to the terminal date as the most reliable expression of an employee’s wishes.

9. The position taken by the applicant and employer in this case was considered and



specifically rejected by the Board in *V.S. Services Q.E. Hospital*, [1978] OLRB Rep. March 323. The Board at p. 324 of its decision stated:

The Board has consistently ruled that statements of re-affirmation, if filed within the time requirements of Section 49(2) [now 57(3)] are evidence of employee wishes which must be considered by the Board in the exercise of its authority under Section 49(3) [now 57(4)] of the Act.

(For other termination cases where the Board has considered a document of re-affirmation of union support filed subsequent to a statement of desire filed in opposition to the trade union see *Mitten Industries Galt Limited*, [1976] OLRB Rep. March 76 and *Redpath Sugars Ltd.*, [1974] OLRB Rep. July 502).

10. A statement of desire in opposition to a trade union is presented to the Board on an application for certification for a different purpose than a similar statement of desire filed in support of an application for the termination of a union's bargaining rights. The relevance of a statement of desire filed in opposition to a trade union on an application for certification is limited to the exercise of the discretion given the Board in section 7(2) to order the taking of a representation vote notwithstanding membership evidence in excess of 55 per cent of the employees in the bargaining unit. A numerically relevant voluntary statement of desire may cause the Board to entertain sufficient doubt as to the reliability of the membership evidence to cause the Board to seek the confirmation of a representation vote. The statement of desire in opposition to the trade union does not cancel evidence of trade union membership filed by the union on behalf of a person who has subsequently signed the statement of desire in opposition to the union. (See *Royal Canadian Yacht Club*, Board File #0780-80-R; application for judicial review dismissed, (1981), 129 DLR (3d) 554; application for leave to appeal refused April 26, 1982). Accordingly, if a union has filed membership evidence for between 45 and 55 per cent of the employees in the bargaining unit, the petition is irrelevant. It does not reduce the membership evidence below 45 per cent and the union would still be entitled to a representation vote even if the petition proved to be voluntary.

11. In contrast to the certification situation, on an application for termination the statement of desire in opposition to the union is not filed with the Board for the purpose of affecting the exercise of the Board's discretion. Rather its purpose is to establish a sufficient level of opposition to the union to entitle the applicant to the taking of a representation vote pursuant to section 57(3) of the Act. In both situations, though, when the Board looks at a statement of desire it is to evaluate employee wishes.

12. When a counter-petition of revocation or re-affirmation is filed with the Board on an application for certification it is also considered relevant to ascertaining employee wishes in order to determine whether sufficient doubt has in fact been cast, by the petition, on the reliability of the membership evidence so as to cause the Board to exercise its discretion and order the taking of a representation vote. In *National Seal Division of Oil Seals Ltd.*, 63 CLLC ¶16, 295 the Board at pp. 1224 - 1225 said,

It is contended by counsel on behalf of the intervener, that no provision is made in the Act or in the Board's Rules of Procedure for filing or receiving counter petitions. On this basis, he argues that the Board has 'no jurisdiction' to receive or consider them. Alternatively, he

argues that even if the Board can and does receive and consider the counter petitions, they should not be given equal weight with the signatures on the petitions. In this respect, it is his contention that the signatures on the counter petitions only emphasize the fact that the employees are in a state of doubt. This doubt, he argues, must be resolved by a representation vote. While the Board's Rules of Procedure do not make any express provision for, or indeed mention any procedure for the filing of documents in the nature of the counter petitions filed in the present case, it does not follow that this, therefore, establishes that the Board has 'no jurisdiction' to receive and consider them. In our view, the counter petitions clearly constitute evidence relating to membership within the meaning of section 77(j) of *The Labour Relations Act*, and of section 50 of the Board's Rules of Procedure. It is, therefore, abundantly plain to us, that so long as these documents are filed by the terminal date, they may be received and considered by the Board as evidence relating to membership under the general provisions of section 77(j) of the Act and section 50 of the Board's Rules of Procedure. It has, of course, long been the well-established practice of this Board to admit such counter petitions in evidence.

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The effect of counter petitions or revocations in respect of signatures placed on an earlier petition in opposition to an application for certification has been considered by the Board in the past and again recently in *The Fleck Manufacturing Ltd.* case, CCH Canadian Labour Law Reporter, vol. 1, ¶16,236 at p. 13,201, as follows:—

In cases where revocations are filed in respect of signatures to a petition and it is evident to the Board from all the circumstances that the persons signing the revocations intended to revert to and reaffirm their original positions as reflected by the evidence of membership filed by the union, the revocations and original evidence of membership represent the most persuasive and reliable evidence of their wishes....

We are constrained to infer from the facts agreed to by all counsel in this case that the persons who signed the counter petitions did so with the intention of reverting to and reaffirming their original positions as reflected in their applications for membership and receipts filed by the union as evidence of membership. In our view, therefore, the most reliable evidence of the true wishes of the employees is that which is represented by the original evidence of membership submitted by the union and now reaffirmed by the counter petitions.

On this basis the Board has long held that in ascertaining employee wishes for the purpose of the exercise of its discretion in section 7(2), counter petitions re-affirming support for a union are as relevant as a petition against the union standing on its own. (See also *Swingline of Canada Ltd.*, [1978] OLRB Rep. Mar. 323; *The Great Atlantic and Pacific Tea Company*

*Limited*, [1970] OLRB Rep. Dec. 934; *White Die Casting Company Limited*, [1970] OLRB Rep. Dec. 948 and *Frito-Lay Canada Ltd.*, [1981] OLRB Rep. May 538.).

13. To draw a further comparison between the certification and termination situation, on an application for certification the effect of the counter-petition is to re-affirm the earlier filed membership evidence. On an application for termination, on the other hand, the counter-petition stands on its own as evidence of union support.

14. As with the certification situation, on an application for termination, where the Board is also required to ascertain employee wishes, the counter petition expressing re-affirmed support for the trade union is as relevant as the petition against the union. In section 57(3) of the Act the Board is directed to "ascertain . . . whether not less than 45 per cent of the employees . . . have voluntarily signified in writing at [the terminal date] that they no longer wish to be represented by the trade union . . .". The Board concludes that this section requires the Board to determine the percentage of employees who at the terminal date no longer wish to be represented by the union. The Board further concludes that when it is in receipt of a document, by the terminal date, purporting to express the wishes of employees to continue to be represented by the trade union, it is incumbent on the Board to give it full consideration in determining under section 57(3) "whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at [*the terminal date*] that they no longer wish to be represented by the trade union . . ." (emphasis added). A numerically relevant counter-petition received by the Board by the terminal date purporting to express the wishes of employees on the question of union representation cannot be ignored by the Board as urged in this case by the applicant and employer. It is evidence which must be considered by the Board to determine the state of employee wishes as at the terminal date.

15. In the instant matter, therefore, the Board has before it for consideration a statement of desire in opposition to the trade union, which the union acknowledges was voluntary at the time it was signed, and a subsequent counter-petition filed by the union prior to the terminal date re-affirming support for the union bearing the signatures of 12 persons who had earlier signed the statement of desire in opposition to the union.

16. The Board heard evidence relating to the voluntariness of the counter-petition. Mr. Robert MacLellan and Mr. Fred Dehne, both union stewards and employees of Browning & Ferris Industries Ltd., testified to the origination, preparation and circulation of the counter-petition re-affirming support for the union. The Board concludes from the evidence that the employees who signed the counter-petition were fully aware of the nature and purpose of the document and that they attached their signatures without any threats or undue pressure.

17. It has, on occasion, been suggested that a union as exclusive bargaining agent holds a position of influence over employees in a bargaining unit which would place undue pressure on employees who are asked to sign a counter-petition. In *V.S. Services Q.E. Hospital*, *supra*, at p. 325 the Board considered and rejected this submission:

Counsel for the applicant argued that in the circumstances of a termination application the union, as the exclusive bargaining agent, enjoys a position of influence over the employees in the bargaining unit which is analogous to the position of influence enjoyed by the employer. It is his submission that the evidence which establishes that the president



of the respondent union approached bargaining unit employees individually during working hours, should cause the Board to find that "tacit, unspoken pressure" was exerted such that the statement of reaffirmation does not represent the true wishes of those who signed it. The Board is unable to accept the submission of counsel in this regard. A trade union which holds exclusive bargaining rights does not enjoy a position of influence over the employees in the bargaining unit as does the employer who can hire, fire or otherwise affect an employee's career. The very fact that the bargaining rights held by the union can be terminated by bargaining unit employees underscores the fundamental difference between the position held by the employer on the one hand and the trade union on the other.

In the Board's opinion the issue of undue influence from a union is a question of fact to be considered in each case and is clearly not a matter of presumption. In the instant situation the Board is satisfied that no undue influence was exerted by the union in the process of gathering signatures on the counter-petition. The Board is fully satisfied, therefore, that the counter-petition represents the voluntary wishes of its signatories.

18. When faced with two voluntary yet conflicting documents, a petition and counter-petition, with overlapping signatures, how does the Board determine the relative weight to be accorded each document and draw a conclusion as to the employees' wishes as at the terminal date as required by section 57(3) of the Act? A number of various approaches could be taken. Firstly, the Board could inquire into the circumstances relating to both the petition and counter-petition and decide on the basis of the evidence which is the more voluntary and thus the more reliable reflection of employee wishes. Secondly, and particularly on an application for certification, the Board could decide that the mere existence of two conflicting documents with overlapping signatures reflects sufficient confusion among the employees to justify the taking of a representation vote. Thirdly, the Board could look to the last voluntary expression of desire prior to the terminal date as the most reliable indicator of employee wishes. Having carefully considered the merits of these three options, the Board is satisfied that in assessing petitions and counter-petitions the third option is the best option.

19. Petitions and counter-petitions are documents which the Board admits as evidence of employee wishes despite their hearsay nature. In order to protect the secrecy of an employee's desire with respect to union representation as ensured by section 111(1) of the Act, the Board ascertains the voluntariness of the expressed wishes of each signatory on a petition and counter-petition through evidence given by the person(s) who circulated the document as to how the signatures were obtained. To go beyond a general conclusion of voluntariness to determine which of two voluntary yet conflicting documents is the *more* voluntary, the Board would have to entertain further evidence from individual employees as to why they signed two documents expressing opposing wishes. The critical problem with this procedure is that it would expose the identity of numerous individual signatories and cause them to reveal whether they do or does not wish to be represented by a trade union. Section 111(1) of the Act protecting the disclosure of an employee's wishes provides as follows:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a

proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union. R.S.O. 1970, c. 232, s. 100(1).

20. While the Board has the authority to require an individual to answer a question that would reveal his desires regarding union representation, the Board is most reluctant to do so unless absolutely necessary. In view of the alternate avenues available for ascertaining employee wishes as set out above and having regard to the spirit of section 111(1) of the Act, the Board has chosen not to seek to measure which of two or more conflicting documents is the most voluntary.

21. The second approach that the Board could take and one that would not reveal the desires of individual employees would be to conclude from the mere existence of two conflicting and overlapping documents that there is sufficient confusion to cause the Board to order the taking of a representation vote. To take this approach would be to adopt an arbitrary procedure which would ignore the numerous reasons why an employee might have two conflicting documents and yet not be confused. An employee, for example, who in fact supports the union may decide to sign a petition being circulated against the union simply "to protect himself", fully intending to subsequently sign a document in support of the union which is designed to erase the effect of his signature on the original statement of desire. Another employee may sign a statement of desire against the union because at the time he signs it he does not in fact support the union. After giving further thought to the situation, however, he may change his mind and decide he would like to continue to be represented by the trade union and thus seek to erase his signature from the petition against the union by signing a counter-petition supporting the union. Given these variables the Board is not prepared to conclude that the mere existence of two conflicting documents either reflects confusion among employees or requires the taking of a representation vote to ascertain employee wishes.

22. The third option for measuring employee wishes from two voluntary yet conflicting documents (that is a petition and counter-petition) is to consider the last voluntary expression of an employee's desires prior to the terminal date as the most reliable expression of his wishes. This procedure which the Board has long followed avoids the arbitrariness of the second option of adopting a policy of ordering a vote on the mere existence of two conflicting documents. As well, and in contrast to the first option of adopting a policy of weighing relative degrees of voluntariness to decide which of two documents is the more voluntary, it protects the secrecy of an employees' wishes regarding union representation as intended by section 111(1) of the Act. Moreover, and most importantly, the Board is satisfied that the last expression of desire prior to the terminal date which is voluntarily made, as determined through objective evidence of the circumstances surrounding the origination, preparation and circulation of the statement of desire is generally the most reliable and probative evidence of employee wishes. On the basis of the considerations set out above the Board has traditionally taken this third approach to ascertaining employee wishes from two voluntary yet conflicting documents. There is nothing in the instant case to cause the Board to depart from its well established practice.

23. We conclude on the evidence presented that twelve persons who voluntarily signed

the petition against the union, subsequently voluntarily re-affirmed their support for the union prior to the terminal date. The effect of their subsequent declaration of support for the union is to remove their names from the list of those who *as at the terminal date* have voluntarily indicated that they no longer wish to be represented by the trade union.

24. On the evidence submitted to the Board therefore we conclude that less than 45 percent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent union on May 29, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(2) of the Act.

25. Accordingly, the application for termination is dismissed.

#### **DECISION OF BOARD MEMBER W. WIGHTMAN;**

1. As has been argued in other cases, it is my view that, at best, a counter-petition underscores the questionable value of membership evidence and petitions as measurements of the wishes of any given group of employees and the preferability of a supervised secret ballot as the means of making such determinations.

2. For this reason I would have granted a vote.

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**2321-81-R** A. Da Cunha and others, Applicants, v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, Respondent, v. **Canadian Pacific Hotels Limited** (Chateau Flight Kitchen), Intervener, v. Group of Employees, Objectors

**Petition – Practice and Procedure – Termination – Termination application signed by more than 45 percent of unit employees – Effect of counter-petition reducing percentage below 45 percent – Board not satisfied of reliability of counter-petition as indicating true employee wishes**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members H. Kobryn and W. H. Wightman.

**APPEARANCES:** *Stewart D. Saxe and Adam Da Cunha for the applicant; Alick Ryder Q.C. for the respondent; Katharine Braid and James Forrest for the intervener; Racheal Pow for the objectors.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; June 14, 1982**

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of section 57(2) of the *Labour Relations Act*. Sections 57(2) and (3) provide:



57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.

...

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. The applicant, Mr. Da Cuhna, works at Malton Airport as a galley-checker in the Flight Kitchen that is the subject of this application. He was formerly one of the stewards for the bargaining unit, but became personally disenchanted with the services the respondent was providing. He began to discuss with others the possibility of a change in bargaining agent, and eventually got in touch with a business agent of the International Association of Machinists, the trade union representing members of the ground crew at Malton Airport. With the guidance of the Machinists' Union, Mr. Da Cuhna and another employee circulated the present petition to decertify the respondent. The petition reads:

We, the undersigned employees of Canadian Pacific Hotels Limited, (Chateau Flight Kitchen), Malton, Ontario, hereby state our desire that we no longer wish to be represented in collective bargaining by Hotel, Restaurant and Cafeteria Employees, Union Local 75.

The Board has absolutely no doubt that management was a party to neither the conception nor the circulation of this petition. Neither does the Board find that employees were misled in any way as to the purpose or effect of signing, as a step towards ending the representational rights of the respondent.

3. There was, however, a counter-petition filed with the Board in favour of *continuing* the bargaining rights of the respondent. This petition reads:

We, the undersigned employees of Canadian Pacific Hotels Ltd. (Chateau Flight Kitchen), Malton, Ontario, do not wish to be decertified or lose our bargaining rights with our Union, Local 75, Hotel, Restaurant and Cafeteria Employees Union.

There were a relatively small number of employees who signed *both* petitions, but the overlap

was sufficient, if the expression of an employee's wishes on the second document were held to cancel his or her wishes on the first document, to reduce the support for Mr. Da Cuhna's application below the necessary 45 per cent of the bargaining unit.

4. Counsel for the applicant argues that the Board ought to disregard the counter-petition entirely, on two grounds:

- (1) that the Board lacks the jurisdiction to do anything *but* order a representation vote, once a voluntary petition has been submitted which bears the names of not less than 45 per cent of the bargaining unit. In support of this, counsel points to the use of the word "shall" in section 57(3), as opposed to the word "may" in section 7(2) dealing with certification. Counsel characterizes the reference in section 57(3) to "at [the terminal date]" as simply a signal to an applicant to deliver to the Board by that date whatever material he may have in support of his application.
- (2) If the Board does have a discretion, it ought to exercise it so as not to give weight to a petition which openly calls upon an employee to declare his or her support for an *incumbent* trade union. Counsel contrasts the position and influence of a trade union which has become established in the work place as exclusive bargaining agent with that of a trade union simply knocking at the door, and argues that the former holds in the eyes of employees a special status not wholly dissimilar to that enjoyed by management.

5. Counsel for the applicant candidly concedes that there is a long line of Board jurisprudence which stands directly opposed to the propositions he puts forward. See *VS Services*, [1978] OLRB Rep. Mar. 323, and the cases cited therein. He argues, however, that the time has come for a re-appraisal by the Board of the position it has adopted in the past.

6. Precisely the same submissions have, however, been considered and again rejected by the Board in the very recent case of *Browning-Ferris Industries*, [1982] OLRB Rep. June 816. The Board notes, however, at least one significant difference which has always existed between the effect of a "counter-petition" in a termination, as opposed to a certification proceeding. In a certification proceeding, the Act calls for employee wishes to be evidenced at the outset by the filing of individual forms of membership evidence, together with all of the additional elements, such as evidence of the payment of fees in earnest, and the declaration provided in Form 9, which have been built into the certification system. If membership exceeds 55 per cent of the bargaining unit, normally the Board would certify an applicant on the basis of that evidence; but if a subsequent petition casts a cloud upon the representativeness of that membership evidence, the Board may resort to a secret-ballot vote as a further means of identifying employee wishes. In such circumstances, a voluntary *counter-petition* may simply cause the Board to accept the reliability of the original membership evidence filed and grant the certification being sought. On a termination application, the counter-petition seeks in effect to have the Board disregard the issue of representation which a voluntary petition has raised, and dismiss the application entirely. To do that, the Board would, at the very least, have to be fully satisfied of the reliability of the second or "counter"-petition as an indicator of employee wishes. The Board is not so satisfied in the present case.

7. The bulk of the signatures on the counter-petition were collected by Racheal Pow, a checker and steward in the Flight Kitchen. Mrs. Pow indicated that roughly 90 per cent of the employees in the bargaining unit could neither read nor write English. The preamble to the counter-petition was in English, and closely paralleled the form of Mr. Da Cuhna's. Mrs. Pow testified that she explained to each employee what the petition was about. Her account to the Board of that explanation was, however, confusing, and she was asked whether it was possible that some of the employees she approached to sign would have thought they were signing Mr. Da Cuhna's petition again. She replied: "I don't know really — I can't answer that".

8. Based on Mrs. Pow's evidence, and the close similarity between the two positions, the Board finds that it cannot give such weight to the second petition as to cancel the first, and cause the Board to dismiss this application.

9. Considering all of the evidence before it, the Board remains satisfied that not less than forty-five per cent of the employees in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of February 17, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of making such determination.

10. The Board accordingly directs that a representation vote be taken of the employees of Canadian Pacific Hotels Limited (Chateau Flight Kitchen).

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12. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. While agreeing with the decision to order a vote, my grounds for doing so would have been on the grounds argued by Counsel for the applicant.

2. Counter petitions derive their legitimacy from the Board practice of viewing them as a logical extension of the certification provisions of the Act. Whatever basis may have existed for such a viewing of this type of document, I believe the practice should be re-examined in light of contemporary realities and empirical evidence and experience.

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**1540-81-R; 1680-81-R; 1681-81-U** International Ladies Garment Workers' Union, Applicant/ Complainant, v. 490296 Ontario Limited, carrying on business as **Chandelle Fashions**, Respondent, v. Group of Employees, Objectors

Related Employer – Remedies – Sale of a Business – Unfair Labour Practice – Prior Board order to assist union in organizing and directing reinstatement and compensation to employees unlawfully laid off – Company subject to order declaring bankruptcy – Business taken over by another company – Whether purchaser constituting successor employer – Whether outstanding remedial orders flowing through to successor employer – Bona fide purchaser for value without notice not bound by remedy against predecessor – Whether bankrupt company and purchaser related employers – Union having no bargaining rights to preserve – Related employer provisions not appropriate for sole purpose of enforcing remedy against purchaser

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

*APPEARANCES:* E. McIntyre, E. Marszewski and L. Goguen for the complainant; R. C. Filion and R. H. Saunders for the respondent; M. Weinberg for the objecting employees.

**DECISION R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON;** June 4, 1982

*Background*

1. The Board directs that the above applications and complaint be and the same are hereby consolidated.
2. This is an application for certification which was heard concurrently with applications under sections 63 and 1(4), and a related unfair labour practice complaint. These are but the latest in a long series of proceedings involving the business known as "Chandelle Fashions". In order to appreciate the context in which the current proceedings arise, it will be necessary to refer briefly to this earlier litigation. For ease of reference the firm Chandelle Fashions Limited will be referred to as "Chandelle"; the International Ladies Garment Workers Union will be referred to as the "ILG"; the Amalgamated Clothing and Textile Workers Union will be referred to as the "Amalgamated"; and 490296 Ontario Limited will be referred to as the "Numbered Company".
3. Chandelle was a manufacturer of ladies' wear with factory facilities in the City of Toronto. In early October 1980, the Amalgamated began an organizing campaign among Chandelle's employees. It was assisted in this endeavour by Vittoria Bellissimo and Anna Cipresi.
4. The Amalgamated was not the only union interested in organizing Chandelle's employees. At about the same time, the ILG initiated its own independent campaign. The ILG's principal employee contacts were Lisa Kronquist and Lina Bisogni.
5. The two campaigns proceeded in tandem throughout the early weeks of October;

and both had some success. The Amalgamated started first, and eventually solicited more membership cards; however, the ILG's claim that it was the best union to represent workers in the ladies' garment industry also had considerable impact. Indeed, the existence of parallel organizing efforts made it somewhat difficult to ascertain the employees' true allegiances, and some employees signed cards in both unions.

6. Both campaigns were brought to a dramatic halt on or about October 21, 1980, when Chandelle laid off the principal supporters of *both* unions. On October 31, 1980, the Amalgamated filed a formal application for certification requesting that a pre-hearing representation vote be taken. In addition, the Amalgamated filed unfair labour practice complaints on behalf of its two supporters. When the Amalgamated lost the representation vote, it made a further application arguing that the employer's unfair labour practices had so influenced the balloting that the true wishes of the employees could no longer be reliably ascertained by this means, and seeking a certificate pursuant to section 7a (now section 8) of the Act.

7. The ILG also filed unfair labour practice complaints on behalf of its two supporters; but the ILG opposed the certification of the Amalgamated on the ground that the ILG also had a significant core of support, and that a section 8 certificate would therefore be inappropriate. For its part, Chandelle denied that the lay-offs were motivated by the employees' union activities, and opposed the Amalgamated's certification application. Chandelle asserted that the lay-off was caused by deteriorating business conditions, and the selection of persons to be laid off was based entirely upon a bona fide assessment of their relative abilities. It was simply a coincidence that the key union supporters of both unions had been selected. These individuals were recalled immediately before the commencement of the enquiry before the Board. As it turned out, that enquiry was a protracted one.

8. The arguments submitted in the earlier proceeding are fully set out in the decision of the Board dated July 17, 1981. It is unnecessary to reiterate them here. It suffices to say that the Board rejected Chandelle's explanation for the lay-offs, and found that the four union supporters (Bellessimo, Cipresi, Kronquist and Bisogni) had been selected for lay-off because of their union activities. The Board directed that the four employees be compensated for the wages and benefits lost by reason of their unlawful lay-off. On the other hand, the Board rejected the Amalgamated's contention that it should be certified pursuant to section 8 of the Act. While Chandelle's conduct was undoubtedly a serious interference with its employees' statutory rights, both unions had established a significant core of support, and both union organizing campaigns had been detrimentally affected by the employer's unfair labour practices. Moreover, it appeared to the Board that there had been a shift in support towards the ILG, which in itself might have contributed to the Amalgamated's poor showing in the representation vote. In the circumstances, the Board determined that the appropriate response was a liberal exercise of its remedial authority under section 89 (then section 79) of the Act, in order to counteract and adverse impact of the employer's illegal conduct, and, insofar as it was possible, restore each of the unions, to the position it would have been in had such illegal conduct not occurred. Finally, the Board set aside the earlier representation vote, and ordered that a new representation vote should be taken after the Board's remedial order had been complied with. Since the ILG had not applied for certification, it had no immediate right to appear on the ballot, although it was free to campaign against the Amalgamated as it had done before. An application made by the ILG on June 18, 1981, was untimely and not processed pursuant to section 103(3)(c) of the Act, because, at that time, the Amalgamated's application was still pending before the Board.

9. As we have already noted, these orders and remedial directions were made by a decision of the Board dated July 17, 1981. On June 29, 1981, the Bank of Montreal appointed a receiver to manage the affairs of Chandelle. When the two unions approached the receiver to discuss the implementation of the Board's remedial orders, the receiver refused to comply with any of them, and refused to compensate the aggrieved employees for the losses which they had suffered as a result of Chandelle's breaches of the *Labour Relations Act*. Pursuant to section 89(6) of the Act, the two unions then requested the Board to find that there had been non-compliance, and to determine the precise amounts owing to each of the grievors — a matter of which the Board had remained seized pending the parties' own efforts to settle the quantum of compensation. A few days later, on August 4, 1981, the receiver caused an assignment in bankruptcy. The application under section 89(6) came on before the Board nevertheless, and by a decision dated September 8, 1981, the Board determined the amounts which the four grievors had lost by reason of Chandelle's breach of the Act.

10. In summary therefore, the result of the first set of proceedings was:

- (a) a direction that Chandelle should compensate the aggrieved employees for the monetary losses they had suffered as a result of their unlawful lay-off;
- (b) a direction that Chandelle take certain affirmative action to remedy the consequent damage to the two unions involved;
- (c) an order that the Amalgamated's certification application would be resolved by the taking of a new representation vote after the other remedial orders had been complied with.

11. The outcome of these earlier proceedings is directly linked to those currently before the Board. In June 1981, when the proceedings had not yet been concluded, the ILG enjoyed a resurgence, and was able to attract additional employee support which became the basis for its own certification application filed on October 16, 1981. By this time the employees were employed by the Numbered Company, which is now carrying on the business of Chandelle Fashions. The ILG claims that the Numbered Company is a "related employer" under section 1(4), or a "successor employer" under section 63, so that it "stands in the shoes" of Chandelle in respect of the earlier proceedings. Thus, the union claims that the remedies obtained against Chandelle "flow through" to the Numbered Company, and that the principals of the Numbered Company became responsible for their implementation. Finally, the ILG contends that the Numbered Company has committed a new unfair labour practice in its own right when it failed to recall Kronquist and Bisogni, the grievors in the earlier proceedings, after their lay-off in the summer of 1981.

12. The evidence in respect of these various applications overlaps to some extent, however, for ease of exposition, it will be convenient to deal with each of them separately, beginning first with the application for certification.

#### *The ILG's Certification Application*

13. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.



14. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, shippers, truck-drivers, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. Counsel for the Amalgamated has written to the Board to advise that the Amalgamated has no interest in the ILG's certification application or the related proceedings. The Amalgamated did not intervene in any of them. Accordingly, the Board finds that the Amalgamated has abandoned any rights which it might have had to represent the employees of the Numbered Company. The Board further finds that the Amalgamated's application for certification in respect of the employees of Chandelle (Board File No. 1651-80-R) should be, and the same is, hereby dismissed.

16. In support of its October 16th application for certification, the ILG filed documentary evidence of membership on behalf of 43 individuals. This documentary evidence takes the form of membership cards, which include a combination application for membership and an attached receipt. The cards are signed by the employees, and the receipts are countersigned, and indicate that a payment of \$1.00 has been made within six months immediately preceding the terminal date for the application. The documentary evidence is supported by a properly completed Form 9 statutory declaration as to its regularity. There are no allegations of impropriety in the solicitation of this membership evidence nor are there any apparent defects.

17. The membership evidence submitted by the ILG meets the statutory definition of "member" in section 1(1)(1) of the Act, as well as the Board's prescriptions concerning the form and time for filing of such evidence. Some of the individuals on whose behalf cards were submitted, were no longer employees of the Numbered Company at the time the application for certification was made; however, even if this is taken into account, it is evident that more than fifty-five per cent of the employees in the bargaining unit at the time the application was made were "members" of the applicant union as at the terminal date fixed by the Board pursuant to section 103(2)(j) of the Act. If this membership evidence were standing by itself, the Board would ordinarily grant certification to the applicant pursuant to section 7 of the Act, without recourse to a representation vote.

18. However, there was also filed with the Board a "statement of desire" or "petition" signed by a number of employees and indicating that they wished to oppose the applicant's certification. This petition includes the names of certain individuals who had earlier signed membership cards and paid membership fees, and had, therefore, become "members" of the applicant within the meaning of section 1(1)(1). These "members" had had a purported change of heart, and now allegedly no longer wish to support the applicant's certification.

19. Statements of desire or "petitions" are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement for a monetary payment (in the nature of consideration), or a supporting statutory declaration similar to Form 9. But the possibility of a "statement of desire" is contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and, the Board has a long established practice of giving effect to them, if they are voluntary

and properly supported in accordance with the Rules. If the petition contains the signatures of a sufficient number of persons who have previously signed membership cards so that there is some doubt that the union's members continue to support its certification, the Board will ordinarily exercise its discretion to seek the confirmatory evidence of a representation vote. The Board must be satisfied however that when those union members signed the petition evidencing an apparent change of heart, they were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer or could result in reprisals. It must be clear that the circulation of a petition is entirely free from the actual or perceived influence of management (see: *Radio Shack* [1978] OLRB Rep. Nov. 1043, and *Siegfried Krieser Industries Limited* [1980] OLRB Rep. Nov. 1691). For this reason, the Board undertakes the inquiry into the origination, preparation, and circulation of the petition contemplated by Rule 73. In this case it is also necessary to consider the circumstances in which the union's membership cards were signed.

20. While the litigation involving Chandelle, proceeded through the Spring of 1981, the ILG sought to maintain its base of support. By this time, Andrew Tarka, Chandelle's unpopular production manager, had left, but Tarka's departure did not result in a marked improvement in employer-employee relationships. Tarka's replacement was no better and the ILG was the beneficiary of that employee discontent. In mid-June a large number of employees joined the union. At this point, of course, the Amalgamated's certification application was still pending before the Board.

21. The ILG's own certification application was made on October 16, 1981. It was supported by the documentary evidence of membership gathered in mid-June when the employees were employed by Chandelle. Now they are employed by the Numbered Company. Of course the employees are substantially the same, but the fact remains that they joined the union four months before the certification application, before the departure of Tarka's unpopular successor, before the receivership, before Chandelle's bankruptcy, and before the business was taken over by new principals.

22. The two employees instrumental in preparing and circulating the petition were Manny Weinberg, a cutter, and Fortunata Benatti, a sample maker. Neither employee exercises managerial responsibilities, nor is there any direct evidence of managerial support for the petition. For the most part, the petition was circulated on company premises during breaks and lunch hour. Some of the signatures were probably obtained on the shop floor during work hours; but, there was nothing in the circumstances which would create the perception of managerial involvement, or impinge upon the employees' ability to voluntarily express their current wishes.

23. The situation here is quite different from that of most petition cases, where the employee "change of heart" comes only a few days after the employee has indicated his support for the union. In those cases, a natural question arises as to what happened to prompt the employee to change his mind; and in a not inconsiderable number of cases, the Board has found that the employee was only motivated to sign a petition because of employer conduct suggesting that continued support for the union would result in the loss of his job. In the instant case, however, we do not have a sudden change of heart occurring within days of an unequivocal expression of support. Here, the employee change of heart occurred four months after they had signed membership cards, after the business had gone through serious financial difficulties, after it had been revived by the infusion of new capital from new principals, and

long after the departure of the production manager whose conduct had prompted the employees to turn to the union in the first place. Against this background, it is not at all surprising that employees might reconsider their original support for the union's certification. There is no evidence of management involvement in the origination or circulation of the petition, and the Board is not prepared to accept the union's contention that the petition does not represent the voluntarily wishes of those who signed it. Accordingly, it is our view that the employees in the bargaining unit, should have the opportunity, by representation vote, to determine whether or not they now wish to be represented by the ILG in their relationship with their employer.

24. On the basis of all the evidence before it, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 27, 1981 the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Nevertheless, for the reasons set out above, the Board is satisfied that it should exercise its discretion under section 7 of the *Labour Relations Act* to direct the taking of a representation vote.

25. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

26. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

27. The matter is referred to the Registrar.

### *The Unfair Labour Practice Charges Against The Numbered Company*

28. The union alleges that the Numbered Company has contravened sections 64, 66 and 70 of the *Labour Relations Act*. The thrust of that complaint can be stated quite simply. Kronquist and Bisogni were well known and active supporters of the ILG. In October 1980, they were identified as such, and illegally laid off by Chandelle in an effort to undermine the ILG's organizing campaign. The two employees subsequently returned to work, but were laid off along with other employees in the summer of 1981 as a result of Chandelle's financial difficulties. Many of those other employees were recalled. Kronquist and Bisogni were not. The union maintains that the failure to recall the grievors was motivated, once again, by an employer awareness that they were union supporters. The business now has new principals, but the operating management is essentially the same, and it is not disputed that at this level, the grievor's union sympathies were well known.

29. The Numbered Company resumed the production of Chandelle's fall lines in the first week of October 1981. By October 6th, the date of the certification application, it had a complement of 30 employees — about 60% of what Chandelle previously employed. Its labour force continued to grow as production stabilized. By February 1982, the number of employees exceeded 40.



30. Terri Hegendorfer was the only witness to give any direct evidence as to how the Chandelle employees were selected for recall. Mrs. Hegendorfer testified that the intention was to recall as many Chandelle employees as possible, because they were regarded as a pool of skilled labour from which the Numbered Company could draw. But, there would be no room for “troublemarkers” or persons who would disrupt work, and the actual selection of the persons to be recalled was left to Maria di Bartolomeo, the forelady. Ms. di Bartolomeo took part in the earlier proceedings and was well aware of the grievors’ role in supporting the ILG.

31. Mrs. Hegendorfer told the Board that a “recall list” had been prepared, and, to the best of her recollection Lisa Kronquist’s name was on it. Mrs. Hegendorfer also referred to certain “efficiency reports” prepared for former Chandelle employees; however neither the recall list nor the efficiency reports were produced, and, on cross-examination, it became clear that Mrs. Hegendorfer was not fully familiar with the identifies, let alone the work performance, of the various Chandelle employees. Maria di Barlolomeo did not give evidence.

32. Kronquist and Bisogni are experienced former employees of Chandelle. Neither employee was contacted by Ms. di Bartolomeo, yet, early in November, totally inexperienced employees, fresh from George Brown College, were hired; and on November 12, the business took out newspaper advertisements seeking single needle operators. Both Kronquist and Bisogni are single needle operators. In response to this advertisement, Kronquist called and left her name. Her call was not returned. Mrs. Hegendorfer said she could not understand why this was the case. The two employees were not offered jobs until late December — well after the commencement of the instant proceedings.

33. In an unfair labour practice complaint of this kind, section 89(5) casts upon the respondent employer the onus of demonstrating that it did not act contrary to the Act. Where, as here, it is alleged that a managerial decision was discriminatory, it is generally necessary to produce the individual making that decision so that he can explain the basis for it, and demonstrate that it was not motivated in whole or in part by anti-union animus. Indeed, given the background of this case, it is arguable that some explanation would be called for even in the absence of the statutory reversal of the onus of proof.

34. On the basis of the evidence before us, and especially in light of the onus cast upon the respondent by section 89(5) of the Act, the Board cannot accept its submission that the failure to recall the grievors was based upon bona fide business reasons. No such reasons were explained to the Board, and the person making the ultimate decision did not even give evidence. Two experienced operators who were key union supporters were not recalled, even though one was apparently on the recall list. Kronquist’s response to the newspaper advertisement was not even acknowledged; and if there is a reason for rejecting the grievors based upon their relative ability, the evidence before us does not support it. In the circumstances, the Board is compelled to conclude that the grievors were not recalled because of their trade union activities, and that consequently the respondent has contravened sections 64, 66 and 70 of the Act.

35. Having regard to the foregoing:

- (a) The Board directs that the respondent forthwith offer employment to Lisa Kronquist and Lina Bisogni.

- (b) The Board directs the respondent, the Numbered Company, to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representatives, in conspicuous places at its place of business where the notices are most likely to come to the attention of the employees in the bargaining unit. The respondent shall keep these notice posted for 60 consecutive days. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to all such premises shall be given by the respondent to a representative of the ILG, so that the union may satisfy itself that this posting requirement has been complied with.
- (c) The Board directs that the respondent employer compensate the grievors for any loss which they have suffered as a result of the failure to recall them to employment. In this regard, the Board notes both that the grievors were offered employment in December, 1981, and refused to return at that time; and that it appears that the wages earned by the grievors in alternative employment may well exceed the sum which they would have earned in the respondent's employ. However, the Board did not hear complete evidence on this issue, and will remain seized in the event that there is a disagreement between the parties as to the amount of compensation (if any) to which the grievors, Kronquist and Bisogni are entitled.
- (d) Should the grievors Kronquist and Bisogni accept employment in accordance with this remedial direction, they shall be entitled to vote in the representation vote which the Board has directed.

*The Successor Rights/ Related Employer Issues*

36. The ILG argues that there has been a "transfer" of Chandelle's "business" to the Numbered Company so that the latter is a successor employer within the meaning of section 63. In the alternative the ILG argues that the Numbered Company is a "related employer" within the meaning of section 1(4). The questions which must be determined on this branch of the case, therefore, are:

- (a) whether the Numbered Company is a "successor" and or "related" employer to Chandelle; and
- (b) if the Numbered Company is a successor or related employer, whether it thereby becomes responsible to remedy Chandelle's unfair labour practices.

The statutory provisions relevant to these matters are as follows:

- 1(4) Where, in the opinion of the Board, associated of related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common

control or direction, the Board may upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

37. The principals of Chandelle were Fred and Terri Hegendorfer, who were also the firm’s general manager and sales manager, respectively. John Hooogenboom was Chandelle’s operations manager. He looked after the office, and did the accounting, credit investigations, and collections. Shirley Crowe managed a sales force of about 250 persons, engaged in direct sales to customers through “showings” in private homes. Arnold Grandili was Chandelle’s head-cutter. Maria di Bartolomeo was the factory forelady.

38. The principals of the Numbered Company are Don James and Jeff Conway (with the latter in the role of a “silent partner”). Don James is Shirley Crowe’s brother. James and Conway provided a source of finance which revived Chandelle as a going concern. As James put it, he and Conway became the firm’s “pocket book”. Neither James nor Conway have any knowledge or experience in the garment industry. They are successful entrepreneurs in the telecommunications business.

39. As early as May or June 1981, James was tentatively approached by Shirley Crowe as a potential source of capital for the ailing business. James was impressed by the enthusiasm of the sales force, which he regarded as a key element in the business’ potential success, and



when the Bank of Montreal put the business into receivership, James was annoyed. He considered the move precipitous, unnecessary, and high handed. There were managerial problems, but in his view, the underlying business was sound.

40. Discussions with a view to purchasing Chandelle proceeded throughout June and July. These discussions involved the Hegendorfers, the receiver, James, and Conway, and their legal and financial advisors. The lawyers and accountants were unenthusiastic about the prospect of buying Chandelle, and the receiver proved difficult to deal with; moreover, the inability to reach a compromise threatened to delay production of Chandelle's fall lines. If the firm was to remain a viable entity, it had to maintain continuity of production, as well as contact with its regular customers. But the receiver continued to be intransigent, and Conway and James decided to let the business go into bankruptcy. A bankruptcy would depress the value of Chandelle's assets, and improve their leverage with the receiver.

41. Following the assignment in bankruptcy on August 4, 1981, negotiations to acquire the business continued. Robert Saunders, solicitor for the Numbered Company, gave evidence with respect to those negotiations. The acquisition involved several related transactions which were closed at different points in time, as satisfactory terms were concluded, and the legal documentation completed.

42. The first purchase was concluded sometime in August, and involved certain fabric which was badly needed if the business was to go into production with its fall lines. The design work and sampling had either already been done, or posed no real difficulties; but there were other potential purchasers for this fabric, and it was essential to move quickly to acquire it. Once this was done, the new principals could pursue their acquisition of the other aspects of Chandelle's business.

43. The main agreements were concluded on September 10, 1981, and October 23, 1981. On September 10, the Numbered Company acquired all regular and sample fabric on Chandelle's premises, together with all goods in production, trim, patterns, all existing promotional items and 136 samples. (Certain finished goods had already been disposed of by the receiver who temporarily employed some of the Chandelle sales force.) On October 2, 1981, an agreement of purchase and sale was entered into respect of most of Chandelle's fixed assets and equipment, including: sewing machines (single needle and serging) chairs, tables, lockers, time clocks, clipping machines, fusing machines, electric knives, racking, desks, postage meters, etc. and 4500 finished garments. The Numbered Company also acquired the name "Chandelle Fashions", all existing trademarks and tradenames, pamphlets, inventory, stationery and brochures. Terri Hegendorfer testified that people relied on the name "Chandelle" and it was recognized by hundreds of the firm's former customers. Although the second transaction did not close until October 23rd, production actually began in the first week of October, and by October 16th, the date of the ILG's certification application, more than half of Chandelle's former employees had been "recalled" to work for the Numbered Company.

44. Thus, by early October, the Business was under way again, and carrying-on its production and sales activities very much as before, from the same premises, under the same name, with the same configuration of assets, with substantially the same employee complement and sales force, and the same managerial team. Fred Hegendorfer remains the general manager. Terri Hegendorfer remains the designer and marketing manager. John

Hoogenboom is the operations manager. Shirley Crowe continues to manage the sales force, and is now also assistant secretary treasurer to a director of the Numbered Company. Arnold Grandili is the head-cutter. Maria di Bartolomeo is the factory forelady. From an economic and industrial relations point of view, there is little change in the outward appearance or functioning of the business — save that it now has new financial backers who retain ultimate control over its economic destiny. From the employees' point of view, they continue to perform the same work, in the same place, using the same machines, to produce the same goods under the same supervisors. As far as they are concerned they still work for "Chandelle".

45. Each of the witnesses called on behalf of the respondent employer was closely cross-examined as to his or her knowledge of the outstanding Board proceedings and the orders against Chandelle. The Hegendorfers, were obviously aware of these orders; but they did not mention them to James, Conway or their solicitors. Shirley Crowe was only vaguely aware of the trade union activity and thought the matter was over with when the Amalgamated lost the first representation vote. Crowe was frequently "on the road" and not in close contact with the day to day happenings at Chandelle. Robert Saunders, of the firm of solicitors who acted for the Numbered Company, was unaware of any employer-employee difficulties, and did not conduct any search which would bring the Board's orders to his attention. Saunders testified that it would be unusual to make such enquiries of a receiver in bankruptcy, and there was nothing in the situation of which he was aware which would trigger any concern.

46. The receiver, of course, was well aware of the outstanding Board proceedings, having been in effective control of Chandelle as receiver-manager at the time the remedial orders were made, and having been served with notice of the non compliance hearing. Those orders, it might be noted, were made *prior* to Chandelle's bankruptcy, so there can be no question of paramountcy or other complications arising from the federal bankruptcy legislation. The evidence before the Board is that the receiver, who was then in *de facto* control of Chandelle, simply directed the Hegendorfers to ignore the Board orders and "throw them in the waste basket". Had they been complied with, as at that stage at least, the law required, a notice would have been posted on Chandelle's premises, and anyone inspecting those premises would have been aware of the outstanding labour relations problems. But the receiver chose not to comply with the Board orders either before or after the bankruptcy, and as a result, the unfair labour practices were not remedied, and the Numbered Company was deprived of important information about the business it was seeking to acquire. On the basis of the evidence before it, the Board finds that James and Conway, the principals of the Numbered Company, were bona fide purchasers for value without notice of the outstanding Board orders.

## II

47. Section 63, of the Act, significantly alters the common and commercial law consequences of a change in the legal ownership of a business. When a business or part of a business is disposed of, the transferee acquires it subject to the established collective bargaining obligations of his predecessor. In effect, section 63 substantially preserves the labour relations status quo. To accomplish this objective, the statute gives a special meaning to the term "sale", envisages the continuation of bargaining rights in a severable "part" of an employer's operation, modifies the notion of privity of contract, and, for labour relations purposes, reduces the significance of the separate legal identity of the new employer.

Collective agreements are not treated like ordinary contracts, nor are the union's representation rights co-extensive with commercial ownership. In *Marvel Jewellery Limited*, [1975] OLRB Rep. Sep. 733, the Board summarized the effect of section 63 (then section 55) as follows:

"The primary issue in this case is whether the transaction between the receiver and the Danbury-Shirene partnership amounted to the sale of a business, and not just the sale of a bundle of discrete assets. Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

48. The terms "sale" and "business" have not been exhaustively defined in the Act, in recognition, we think, of the great variety of commercial relationships to which the successor rights concept must be applied, and the need for a case by case elaboration of the law in light of industrial relations considerations and labour law policy. But in view of the broad language of the section and its intended remedial thrust, the Board has always been disposed to give it a liberal interpretation. In particular, the Board has not placed much reliance on the legal form which the business disposition happens to take as between the predecessor and successor, as long as it results in a continuation of the business organization, so that there is a rational basis for preserving the established collective bargaining rights. Thus, the inter-position of a third party, such as a receiver acting as agent or conduit affecting the transfer, has not been considered to be a bar to a successorship, but rather has been held to be simply the "manner of disposition". (See *Marvel Jewellery Limited*, *supra*, *Field-Price Limited*, [1973] OLRB Rep. Oct. 543, *Parnel Foods Limited*, [1971] OLRB Rep. Nov. 715, and *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 818 — application for judicial review dismissed). The broad sweep intended by the extended definition of the term "sale" was discussed in *Thorco Manufacturing Limited*, (1965) 65 CLLC ¶16,052 — a decision of the Board issued shortly after the passage of the first successor rights provisions:

"According to its strict signification, the term *sells* is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, however, the word *sells* has been given a wide definition which includes lease, *transfers and any other manner of disposition* of the business or part thereof. In legal parlance the word *lease* generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time. The word *transfers*, however, is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the



language of the section to denote any legislative intention to restrict the meaning of the word *transfers* to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *and other manner of disposition* is not intended to be in any way limited by or interpreted ejusdem generis with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases* or *transfers*."

And, in *R v. B.C. Labour Relations Board Ex parte Lodum Holdings Ltd.* (1969), 3 DLR (3d) 41, Dryer J. noted the importance of analyzing the transaction from a labour relations perspective, and considering its substance rather than its form:

"One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts is not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. The importance of the "business" in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed as the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer."

49. In contrast to the term "sale", the term "business" is left undefined, — although it is clearly intended to encompass the notion of a business organization made up of a variety of interrelated (and potentially severable) "parts". The Board has frequently found it useful to apply a kind of "tracing principle" in order to identify the extent to which a predecessor's business organization has been acquired by an alleged successor. In *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691, for example, the Board listed a number of factors to be considered:

"In each case the decisive question is whether or not there is a continuation of the business... the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be

considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was.”

If many of the elements that made up the predecessor’s business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a “sale of a business” to which section 63 should apply. If, on the other hand, the alleged successor has its own established business organization by which it services the predecessor’s customers, the inference may be otherwise – even if it has acquired some assets or other incidental elements which might be traced to the predecessor. (See also *Kenmir v Frizze et al* [1968], 1 ALL E.R. 414, and *R. v B.C. Labour Relations Board Ex parte Lodum Holdings Limited* (1969), 3 DLR 3rd 41.)

50. In the instant case, if it were not for Chandelle’s bankruptcy — which arguably constitutes the legal “death” of a business in a commercial law sense — there would be no doubt that the Numbered Company is a successor employer within the meaning of section 63 of the Act. It carries on the Chandelle business under the same name, from the same premises, with the same assets, production employees, sales force and managerial complement, to produce the same product lines (some of which were designed and sampled before the bankruptcy), for the same customers and market. It cannot be said that James and Conway established a new similar business on the ashes of the old, nor did any of the witnesses even suggest that this was the case. All of them candidly conceded that throughout, the purpose of their endeavours was to buy the business and maintain it as a going concern when the continued operation of the business was threatened by the premature intervention of the debenture holders. James and Conway thought that Chandelle was a viable business operation, and did all that they could to maintain it intact. Even the bankruptcy itself was a step toward this objective, because it allowed James and Conway to purchase the business on more reasonable terms than would otherwise be available. The business was not broken up or liquidated. On the contrary, it was purchased “lock, stock, and barrel” and in operation again barely weeks after its purported demise. Whatever the commercial law consequences of Chandelle’s bankruptcy in August 1981, it is clear that Chandelle’s business was transferred to and is now being operated by the Numbered Company. It would be ignoring the evidence as to what has actually transpired here, the way the witnesses themselves characterized the transaction, and the plain meaning of the words in section 63, if the Board were to hold otherwise. It must be noted that that section is triggered automatically upon the fact of a business being transferred from one person to another and further that no provision of the *Bankruptcy Act* was cited which would modify the operation or effect of section 63; however, because of the view we take of the interpretation of that section, it is unnecessary to canvass the bankruptcy issue.

51. The principal issue before us is the potential effect of successor status, assuming that the business transfer which occurred here is unaffected by paramount federal legislation. Ordinarily, a section 63 declaration is a device for preserving established bargaining rights and a collective agreement — but here, the ILG had neither. The ILG had not even filed an effective certification application prior to Chandelle's transfer to the Numbered Company, and in any event, it is not disputed that the Numbered Company is now properly named for that purpose. Prior to the transfer, all that the ILG had were certain remedial orders to assist it in organizing Chandelle's employees orders which, in the event, were irrelevant because the employees were organized without them. The remedial order designed to facilitate contact between the employees and the ILG was issued in mid-July, and by that time the ILG had already organized more than 80% of the employees.

52. Of more immediate concern are the compensation orders in respect of the two employees unlawfully dealt with by Chandelle. The receiver refused to pay such compensation prior to the bankruptcy, and as a result, the employees have not been compensated for the amounts which they lost. It is these remedial orders which the ILG now seeks to enforce against the Numbered Company. In order to determine whether this is a potential consequence of a successor status determination, we have found it helpful to consider both the origin of section 63, and some recent Board decisions touching on that issue.

### III

53. In the absence of a successor rights provision, any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or a collective agreement. The incorporation of the business, its transfer to a new owner, a change in a partnership, etc. would all change the legal identity of the "employer", and undermine bargaining rights, — even where the plant, equipment, products, and workforce remained substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing much the same job as before, but as a result of a transfer of which they might not even be aware, their collective bargaining rights and their collective agreement would disappear. This disruption in the collective bargaining status quo was considered by both the Legislature's Select Committee on Labour Relations (1957-58) and later by H. Carl Goldenberg, Q.C. in his *Report of the Royal Commission on Labour Management Relations in the Construction Industry* (Queen's printer, Toronto 1962). In Goldenberg's view, the preservation of bargaining rights on a transfer of ownership was essential to the orderly conduct of industrial relations. At page 114 of his report, he recommended:

- i. The Act should provide that *where a business or part thereof is sold, leased or transferred, the purchaser, lessee or transferee shall be bound by all the proceedings before the date of sale, and shall become ipso facto a party thereto, and that the proceedings shall continue as if no such change has occurred*, and that if a bargaining agent was certified the certification shall remain in effect, and if a collective agreement was in force that agreement shall continue to bind the purchaser, lessee or transferee to the same extent as if it had been signed by him.
- ii. Consideration should be given to measures for the protection of



acquired bargaining rights in situations arising from certain types of business practices which may affect such rights, for example, where a contractor, engaged on a number of projects in each of which he has a different partner, is in a position to shift employees from a project with respect to which certification has been granted to another.

(emphasis added)

54. But after the release of the Goldenberg Report, legislative change was incremental. The initial legislative response (the *Labour Relations Amendment Act* S.O. 1962-63 Chapter 70 section 47(1)) provided only for a continuation of a union's bargaining rights in the event of a business transfer. There was no "flow through" of any collective agreement then in effect. The Legislature clearly did *not* adopt the broader Goldenberg recommendation that the purchaser should be "bound by all of the proceedings before the date of the sale." Indeed, it has never expressly done so in those terms. Later amendments did provide for the preservation of subsisting collective agreements, the right to give notice to bargain to the successor employer, and the right to continue an ongoing *certification proceeding* respecting the employees of the new owner; however, the statute as presently framed still does not completely encompass the remedy proposed by Goldenberg. In contrast, section 53(1) of the *British Columbia Labour Code* expressly provides that the purchaser of a business is "bound by all proceedings under (the) Act before the date of the sale"; and section 144(1) of the *Canada Labour Code* provides that the person to whom a business is sold generally "becomes a party to any proceeding taken under the (industrial relations part of the code) that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent." These provisions have been held to provide a foundation for liability against a successor in respect of claims initiated prior to the sale (see *Uncle Ben's Industries Limited*, [1979] 2 Can LRBR 126, and *Victoria Flying Services Limited*, [1979] 3 Can LRBR 216).

55. The National Labour Relations Board in the United States has adopted an analogous approach without the benefit of any statutory successor rights provision. In *Perma Vinyl Corporation* [1967] 164 NLRB 169, for example, the successor completed a sale transaction with knowledge that unfair labour practice proceedings were pending against the vendor, and the Board concluded that both companies were jointly and severally responsible to comply with the compensation and reinstatement orders:

"... To further the public interest involved in effectuating the policies of the Act and achieve the objective of national labor policy, reflected in established principles of federal law, we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form *under circumstances which charge him with notice of unfair labor practice charges against his predecessor* should be held responsible for remedying his predecessor's unlawful conduct.

In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, "It is the

employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure any indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."

56. This general approach was ultimately approved by a unanimous United States Supreme Court in *Golden State Bottling Co. Inc.* (1973) CCH ¶14,124 where a successor purchased a business with knowledge of an outstanding reinstatement order directed against its predecessor:

"We agree that the Board's remedial powers under S10(c) include broad discretion to fashion and issue the order before us as relief adequate to achieve the ends, and effectuate the policies, of the Act. Early on, this Court recognized that S10(c) does not limit the Board's remedial powers to the actual perpetrator of an unfair labor practice and thereby prevent the Board from issuing orders binding a successor who did not itself commit the unlawful act. We have said that a Board order that, as in this case, runs to the "officers, agents, successors and assigns" of an offending employer, may be applied not only to a new employer "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, [5 LC ¶51,126] 315 U.S. 100, 106 (1942), but also "in appropriate circumstances . . . [to] those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons." *Regal Knitwear Co. v. NLRB*, [9 LC ¶51,193] 324 U.S. 9, 14 (1945) (emphasis added; see also *NLRB v. Ozard Hardwood Co.*, [40 LC ¶66,759] 282 F. 2d 1, 5 (1960). If the words "person named in the complaint engaged in . . . any unfair labor practice" in S10(c) do not restrict Board authority to prevent orders running to the offending employer's successors and assigns who have acquired the business as a means of evading the Board order, we do not see how those provisions may be read to bar the Board from issuing reinstatement and back-pay orders against bona fide successors when the Board has properly found such orders to be necessary to protect the public interest in effectuating the policies of the Act. The Board's orders run to the evader and the bona fide purchaser not because the act of evasion or the bona fide purchase is an unfair labor

practice, but because the Board is obligated to effectuate the policies of the Act. Construing S10(c) thusly to grant the Board remedial power to issue such orders results in a reading of the section, as it should be read, in the light of “the provisions of the whole law, and...its object and policy.” *Mastro Plactics Corp. v. NLRB* 129 LC ¶ 69,779] 350 U.S. 270, 285 (1956), see *NLRB v. Lion Oil Co.*, [31 LC ¶ 70,446] U.S. 282, 288 (1957).

[Policy of Act]

We in no way qualify the *Burns*’ in concluding that the Board’s order against All American strikes an equitable balance. When a new employer, such as All American, has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor’s failure to remedy the predecessor employer’s unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor’s labor policies. To the extent that the employees legitimate expectation is that the unfair labor practices will be remedied, a successor’s failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer’s labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities. Moreover, the Board’s experience may reasonably lead it to believe that employers intent on suppressing union activity may select for discharge those employees most actively engaged in union affairs, so that a failure to reinstate may result in a leadership vacuum in the bargaining unit. *CF. Phelps Dodge Corp. v. NLRB* [4 LC ¶ 51,120] 313 U.S. 177, 193 (1941). Further, unlike *Burns*, where an important labor policy opposed saddling the successor employer with the obligations of the collective agreement, there is no underlying congressional policy here militating against the imposition of liability.

Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by S7 of the Act, 29 U.S.C. S 157, and protection for the victimized employee — all important policies subserved by the National Labor Relations Act, see 29 U.S.C. S 141 — are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, “his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller’s unfair labor practices.” *Perma Vinyl Corp.*, *supra*, 164 NLRB, at 969. If the reinstated employee does not effectively perform, he may, of course, be discharged for cause. See 29 U.S.C. S 160(c).”



These two American decisions contain a good summary of the policy considerations underlying the argument the ILG urges upon us in the instant case; however, it must be noted that both American cases involved a purchaser with *actual notice* of outstanding unfair labour practice proceedings, while, here, the new owners had no such notice, and had no opportunity to take this factor into account when the transaction was being considered. Indeed, the evidence is that it might not have been completed at all, had James and Conway been aware of Chandelle's labour problems. Moreover, it is crystal clear that the new owners were not acting in any sense as agents for the principals of Chandelle, nor were the new principals parties to any scheme to interfere with rights under the Act. And, of course, in contrast to the situation in the United States, the rights of parties in successorship situations have been carefully prescribed and developed by the Ontario Act, which has been specifically amended from time to time to enhance them. Against this background, it is doubtful whether the Board has the jurisprudential flexibility of the National Labour Relations Board.

57. In Ontario there are a number of arbitral and judicial authorities which have held that a successor employer remains subject to grievances relating to the conduct of his predecessor, regardless of whether he has actual notice of the collective agreement, and whether or not arbitration proceedings were pending at the date of the sale. Such liability was considered to be a natural and necessary implication from the wording of section 63(2) binding the successor to the collective agreement "as if he had been a party thereto". (See: *Man of Aran* [1974] 6 LAC (2d) 238 Shime; *Woodbridge Hotel* [1976] 13 LAC (2d) 96 (Brown) and the decision of the Ontario High Court in *Re Cassin-Remco Limited*, [1980] 105 DLR (3d) 138). However, there is no equivalent language in section 63 vis-a-vis unfair labour practice liability, and the express mention of a continuation of certification proceedings as against the successor tends to suggest that other kinds of proceedings cannot be continued.

58. Only two Ontario Board cases have considered the possibility of a "flow through" of unfair labour practice liability, and neither of them is dispositive of the issues before us in the instant case. In *Sunnylea Foods Limited* [1981] OLRB Rep. Nov. 1640, the Board observed that "there is considerable difficulty in finding as a matter of law that a successor can be primarily responsible for the unfair labour practices committed by the predecessor employer", although ultimately the Board reached no conclusion on this matter, for there were no outstanding proceedings at the date of the sale, and the business did not remain unchanged so as to trigger the rationale set out in the latter part of the *Golden State* decision. Similarly, in *Winchester Press Limited* [1982] OLRB Rep. Feb. 284, there were no proceedings actually pending at the time of the sale and, in consequence, the Board held that it did not have to finally decide the issue currently before us. It merely adverted to the potential importance of notice, and distinguished between reinstatement and compensation orders:

"The strong legislative intent evident in section 1(2) of the Act that a person ought never to lose his employee status by reason of a dismissal contrary to the Act combined with the broad wording of section 89(4) provides considerable support for the contention that this Board has the jurisdiction to direct a purchaser to reinstate an individual whose discharge was the subject of unfair labour practice proceedings that were pending before the Board at the time of the sale. However, none of the cases arising in other jurisdictions goes so far as to grant remedial relief against an innocent purchaser who is unaware of his predecessor's unfair labour practice at the time of the sale and in respect of which no unfair

labour practice proceedings were pending at the time of the sale. It may not be unduly onerous to expect the prospective purchaser to determine if any unfair labour practice proceedings are pending against the party from whom he proposes to purchase a business and, if such proceedings are pending, to take into account their potential outcome, including his potential responsibility for providing some redress to the affected employee(s). It is quite another matter altogether to subject an innocent purchaser to remedial relief in respect of actions of the vendor that might constitute unfair labour practices but in respect of which no complaint has been filed with the Board by the time of the sale. It is simply not realistic to expect a prospective purchaser to investigate all of the vendor's actions that might possibly constitute unfair labour practices. To be meaningful, such an investigation would have to go beyond merely asking the vendor about his actions and obtaining from him a denial of any wrongdoing. A meaningful investigation would require the prospective purchase to make extensive inquiries of the vendor's employees, which inquiries could well result in disclosure of information concerning union activities by various individuals and other information that the Board would not wish to encourage a prospective purchaser to obtain.

Accordingly, even if the combined wording of sections 1(2) and 89 permits us to direct 2Womor to "reinstate" Ms. MacNaughton by offering employment to her, the Board is of the view that it would not be appropriate for us to do so in the circumstances of this case, although we would encourage 2Womor to voluntarily offer to employ Ms. MacNaughton in the next position that becomes available for which she is qualified."

59. In the instant case the successor stresses the apparent inequity in having to remedy unfair labour practices to which it was not a party and of which it had no knowledge. The ILG on the other hand asserts that the Numbered Company could have learned of the outstanding orders against Chandelle had it exercised due diligence in its enquiry, and that there are strong policy reasons why an unfair labour practice should not go unredressed. There is something to be said for both submissions, and, for this reason in choosing between them it is especially important to consider the particular (and perhaps limited) purpose, language, and history of the Ontario successor rights provisions.

60. The essence of the union's submission is that section 63 in its present form is broad enough to encompass the full range of protections proposed in the Goldenberg Report. The ILG argues that the successor becomes subject to all outstanding proceedings. But the Legislature did not wholeheartedly embrace this view either initially or later, and, in contrast with the situation in other jurisdictions, it has not made the successor expressly responsible "for all proceedings pending at the date of the sale." Such legislative models could have been adopted when the Act was amended in 1975, but the legislature did not do so. Indeed, we need not look to other jurisdictions for an appropriate form of words. Section 62, (which deals with the result of a trade union successorship) is unequivocal in its terms:

"Where the Board makes an affirmative declaration under subsection (1),

*the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects."*

(emphasis added)

The more limited language of section 63 and its piecemeal evolution, merely reinforce our view that the rights created by section 63 are also more limited. While we are not unsympathetic to the union's concerns, when considered in context, we do not think the existing language of section 63 is broad enough to meet them. We do not think a bona fide purchaser for value without notice of outstanding unfair labour practice orders, is bound by reason only of its status as a successor employer to remedy its predecessor's unlawful acts. Accordingly, the Board will not direct the Numbered Company to compensate the grievors for the wage loss they sustained as a result of Chandelle's unfair labour practices. Since the grievors are entitled to reinstatement in any event because of the Numbered Company's own unfair labour practice, the Board need not address the issue raised in *Winchester Press* or decide whether the combined effect of sections 63, 89, and 1(2) at least preserve an aggrieved employee's employment status vis a vis a successor employer. And in finding that an innocent and uninformed successor is not responsible for the illegal acts of his predecessor, we wish to make it clear that we express no opinion on the personal liability of the Hegendorfers, or of the receiver who, as noted above, *before* the assignment in bankruptcy, chose to disregard the Board orders to the potential prejudice of both the grievors and the Numbered Company. Finally, the Board reiterates that the law of bankruptcy was not argued before us, so our interpretation of section 63 does not depend thereon.

#### IV

61. The ILG's alternative argument is that Chandelle and the Numbered Company are "related employers" under section 1(4), because both firms employ the same managerial team. The ILG admits that the Hegendorfers et al do not have legal control of the Numbered Company, nor do they have ultimate control of its purse strings. But they do have control of the firm's day to day operations — just as they did for Chandelle. The ILG asserts that this is sufficient to establish "common direction" within the meaning of section 1(4), and argues that it is unnecessary that the related activities be carried on simultaneously. It is no defence to say that the two companies were not in business contemporaneously or that their activities are not related in a temporal sense. That is not a requirement of section 1(4).

62. Section 1(4) is designed to preserve established bargaining rights and prevent them from being undermined by a change in the legal vehicle through which the business activity is carried out. (See *Brant Erecting* [1980] OLRB Rep. July 945.) Section 1(4) ensures that a union's representational rights will be rooted in a business activity rather than its legal envelope, and, in this respect, its purpose is similar to that of section 63. However, here, the ILG had no bargaining rights to preserve. The sole purpose for arguing section 1(4) is to find a solvent party against whom the ILG can enforce its money judgements.

63. The situation here is quite different from that in *Brant Erecting, supra*. There a dominant partner wound up his business arrangements but continued to carry on exactly the same business through a corporate vehicle nominally owned by his wife, but in all material



respects controlled by him. Neither business vehicle had much in the way of transferrable assets so as to call into play section 63, however, the economic reality was that the business had simply undergone a change in corporate form and continued to be carried on, as before, for the primary benefit of the same principal. That is not the situation here. The Hegendorfers are not principals of the Number Company, and the latter cannot be considered their alter ego. They have maintained their nominal positions, but their status has been reduced to that of employees.

64. The facts of this case do not fit easily within the ambit of section 1(4) or the mischief which it was designed to cure. There are no bargaining rights prejudicially affected by the purchase of Chandelle. The ILG has no bargaining rights at all. The sole purpose of the section 1(4) application is to attach liability, to a *bona fide* purchaser for value without notice of the outstanding labour practice claims. In our view this is a proper case for determination under the successor rights provisions, and it must stand or fall on that basis. It is not a situation to which section 1(4) was intended to apply. Even if it could be said that the two corporate entities herein (despite their different principles) were under common managerial “direction”, the Board would not exercise its discretion to make a section 1(4) declaration.

65. For the foregoing reasons the applications under sections 63 and 1(4) are dismissed.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. I have read the decision of the Board in this matter. I agree with the unfair practice finding. I also agree that the ILG’s right to represent the employees should be determined by a representation vote. I do not agree with the Board’s finding on the successor rights issue. I will not attempt to deal with the law of bankruptcy. Even the lawyer for the Numbered Company admitted he was unable to find any cases dealing with this issue. I prefer to approach the matter from a practical labour relations point of view.

2. It is obvious what has happened here. The Numbered Company has bought Chandelle’s business. The Numbered Company was trying to buy the business before August 4, 1981, but the price was too high. After the bankruptcy, it got a better deal. There is no evidence that anyone else was trying to buy Chandelle and no real change in the way it is operating. It is the same business as it always was and it would be ignoring the evidence to find otherwise.

3. In my view, the question before the Board is a very simple one: whether you can break the law and get away with it. The breach of the *Labour Relations Act* occurred before the bankruptcy. The Board decision occurred before the bankruptcy. The Board order was made before the bankruptcy. Yet the Hegendorfers testified that the receiver told them to disregard the Board order and “throw it in the waste basket”. I find this attitude high handed, offensive and hardly likely to engender respect for the law among employees. It may even be illegal, for I see no reason why a receiver appointed to run the affairs of a company should have any license to disregard the law. Why should the agent of the Bank of Montreal et al be permitted, prior to a bankruptcy, to thumb its nose at the *Labour Relations Act* and the employee rights protected by that Act? I find this offensive, and contrary to both the purpose of the Act and the interests of employers and employees governed by it.

4. In my view, the approach which the Board should take in this case is that of the

American Board and Courts in cases such as *Perma Vinyl*. It seems to me to be entirely inconsistent to suggest that an "innocent purchaser" must recognize established employee rights under a private collective agreement, but need not recognize employee rights under the Act itself. One does not have to have much imagination to see the mischief which could arise if a successor had no responsibility for redressing the unfair labour practices of its predecessor. The employees, whose statutory rights had been violated, could be left without jobs and without compensation even though the business continues on as before and, as here, may even employ the same management. I cannot believe that this is what the Legislature intended; and if I am wrong, it points up the need to amend section 63 so that it reads like the federal and British Columbia legislation.

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## The Labour Relations Act

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**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

WE HAVE ISSUED THIS NOTICE TO ALL EMPLOYEES IN ORDER TO COMPLY WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. THAT ORDER WAS MADE AFTER A HEARING IN WHICH ALL INTERESTED PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE UNLAWFULLY FAILED TO OFFER EMPLOYMENT TO LISA KRONQUIST AND LINA BISOGNI, CONTRARY TO THE ONTARIO LABOUR RELATIONS ACT. THE BOARD HAS ORDERED US TO COMPENSATE EACH OF THESE EMPLOYEES FOR ANY WAGES WHICH THEY HAVE LOST. THE BOARD HAS ALSO DIRECTED US NOT TO INTERFERE WITH OUR EMPLOYEES' RIGHT TO JOIN OR NOT TO JOIN A UNION, AND HAS ORDERED US TO INFORM ALL OF OUR EMPLOYEES OF THEIR RIGHTS.

THE ONTARIO LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THE RIGHT:

- (A) TO FORM OR JOIN A TRADE UNION OF THEIR CHOICE;
- (B) TO ENGAGE IN COLLECTIVE BARGAINING CONCERNING THEIR TERMS AND CONDITIONS OF EMPLOYMENT;
- (C) TO REFUSE TO DO ANY OF THESE THINGS.

THESE RIGHTS ARE GUARANTEED BY LAW.

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

- WE WISH TO ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT LAY OFF OR DISCRIMINATE AGAINST EMPLOYEES IN ANY WAY BECAUSE THEY WISH TO SUPPORT A TRADE UNION.
- IF THE EMPLOYEES CHOOSE A TRADE UNION TO REPRESENT THEM, WE WILL NOT DISCRIMINATE AGAINST ANY EMPLOYEE SUPPORTING THAT UNION, AND WE WILL BARGAIN IN GOOD FAITH WITH THE UNION, AND MAKE EVERY REASONABLE EFFORT TO CONCLUDE A COLLECTIVE AGREEMENT. IF AN UNDERSTANDING IS REACHED, WE WILL SIGN A CONTRACT WITH THE UNION OF THE EMPLOYEES' CHOICE.

490296 ONTARIO LIMITED, CARRYING ON BUSINESS  
AS "CHANDELLE FASHIONS".

PER (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**



**2200-81-M International Union of Operating Engineers, Local 793, Applicant, v. Employer Bargaining Agency and its Affiliate Comstock International Ltd., Respondent**

**Construction Industry Grievance – Practice and Procedure – Area practice differing from provision of collective agreement – Area practice estopping union from grieving**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and M. A. Ross.

**APPEARANCES:** *E. A. Ford and M. Quinn for the applicant; G. Grossman, E. Woerner and H. Martin for the respondent.*

**DECISION OF THE BOARD; June 30, 1982**

1. This is a referral of a grievance to the Ontario Labour Relations Board pursuant to section 124 of the *Labour Relations Act*. At the commencement of the hearing in this matter counsel for the respondent raised a preliminary objection. The Board heard the representations of the parties on this objection and dismissed the grievance for the following reasons.

2. The grievance which is the subject matter of the referral relates to a job by the respondent, Comstock International Ltd. at Iroquois Falls, Ontario. The grievance alleges a violation of articles 2.1 and 2.2 of Schedule B of the Provincial Collective Agreement between the applicant, International Union of Operating Engineers, Local 793 and the respondent, Employer Bargaining Agency. That clause relates to commuting, transportation and travel expenses allowances. At the commencement of the hearing in this matter, counsel for the respondents took the preliminary position that the applicant was estopped from bringing the present grievance. The estoppel argument, which we shall go into more detail later on, was based upon an agreement by the parties as to past practice.

3. The parties are agreed that there has been a past practice for employers, such as the respondent Comstock International Ltd., and other "local" employers, that when Timmins area residents are hired for Timmins area jobs they are paid their commuting pay such as mileage allowance and not board allowance from the Timmins area. This practice has been going on since at least 1978 and the language provisions on which the grievance is based have been in effect since 1978. The job at Iroquois Falls is some 40 miles from Timmins, and in view of the practice the respondent, Comstock International Ltd., has been paying \$13.20 per day as mileage for the employees at Iroquois Falls. The position of the union is that the employer should be paying from the City Hall closest to the job site, and that City Hall should be Sudbury, which would be a distance over 100 miles which would entitle the employees to room and board of \$29.00 per day. Although, clearly the union admits that there has been a past practice of dealing with the Timmins area as a local area rather than Subdury.

4. Counsel for the respondent took the position that the past practice of accepting Timmins area residents on Timmins area jobs as local employees and thus paid commuting or mileage allowance to jobs in the Timmins area and not board allowance has been going on since 1978, and notwithstanding any clear language of the collective agreement that this having been the practice at the time the agreement in question was renewed in 1980, the union is now estopped from denying that area practice. In support of this argument, counsel for the

respondent relied on the decision of the Ontario Divisional Court in *Re Canadian National Railway Co. et al. and Beatty et al.* (1982) 128 D.L.R. (3rd) 236. In that case, as in the present case, the collective agreement being interpreted said one thing, but there was agreement between the parties that the practice had been quite different from what the language of the agreement indicated. Further, that agreement had been the subject of bargaining and had not changed notwithstanding the practice in question. At page 243 of the decision, Mr. Justice Osler found:

“Reflection and a perusal of many arbitration cases, including those to which the present arbitrator made reference, has persuaded me that the judgment in the *Sarnia General Hospital* case, to the extent that it doubted whether the principle of estoppel by conduct could arise in labour arbitration proceedings, was too sweeping, as well as going beyond what the decision of the case required. True, a collective agreement, like a contract, should be construed without reference to extrinsic evidence if it is clear upon its face. What the arbitrator did here, however, was not to interpret the agreement but to make a finding as to its proper application and to give consequential relief.

That finding surely fits within the principles enunciated by Denning L. J. in *Combe v. Combe*, cited above. By its conduct in persistently paying many classifications of employees from the first day of illness in the face of a clause providing for a waiting period, the company gave the union an assurance which was intended to affect the legal relations between them. The union took the company at its words and refrained from requesting a formal change in the agreement. The company should not now be allowed to revert to the previous relations as if no such assurance had been given.

The problem of getting evidence of such conduct before the arbitrator did not arise by virtue of the agreed statement of facts and issues. In any event, it is not necessary for our decision to review the whole law of evidence as it relates to arbitrators. We think the arbitrator was within his powers in applying the doctrine of estoppel. No jurisdictional error has been demonstrated and the application to quash should be dismissed with costs.”

5. In our view, in the present case the Employer Bargaining Agency was in precisely the same position as the union in the above quoted case. Here, there had been a recognition of a special arrangement for Timmins by the union and this arrangement was considered clear enough that the employer did not question it in the 1980 re-negotiation of the agreement. For the union to come forward at this time and deny that arrangement would be precisely the kind of unfairness that the estoppel doctrine seeks to prevent.

6. For the foregoing reasons, therefore, the Board dismisses the present grievance.

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**0075-82-JD** United Association, Local 800 and The Ontario Pipe Trade Council, Complainants v. The Mechanical Contractors Association of Sudbury, **Comstock International Limited** and Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America, Respondents

**Jurisdictional Dispute – Whether collective agreement requiring referral to IJDB – Whether party attorned to IJDB jurisdiction – Whether fact that IJDB not making decisions causing Board to hear complaint**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *Alex J. Ahee for the applicant; David McKee and David Stewart for the respondent Millwright Local 1425; and Eric R. Woerner for the respondent Comstock International Limited.*

**DECISION OF THE BOARD; June 18, 1982.**

1. This is a complaint under section 91 of the *Labour Relations Act* in which the complainants, United Association, Local 800 and the Ontario Pipe Trades Council, are requesting that the Board issue a direction with respect to certain work. (For ease of reference, the complainants will be referred to in this decision as the “U.A.”). It is the position of the respondent Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America (the “Millwrights”) that the Board has no jurisdiction to inquire into this complaint because of section 91(14) of the Act which provides:

“The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers’ organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers’ organization shall do or abstain from doing anything required of it by the decision of such tribunal.”

In the alternative, counsel for the Millwrights asks the Board to exercise its discretion under section 91(13) to postpone inquiry into the complaint until the complainant has exhausted its remedies before the Impartial Jurisdictional Disputes Board for the Construction Industry (the “I.J.D.B.”). Eric Woerner, who appeared at the hearing on behalf of Comstock International Limited (“Comstock”), elected to refrain from making any submissions to the Board with respect to those preliminary matters.

• • •

3. The relevant provision in the collective agreement binding on Comstock and the Millwrights (the “Millwrights Agreement”) is Article 14(b):

“If a jurisdictional dispute arises on any job between the Party of the Second Part [the Millwrights] and any other Building Trades Union that is affiliated with the AFL-CIO Building and Construction Trades



Department, same shall be settled by submitting the dispute immediately to the Impartial Jurisdictional Disputes Board for a decision. The decision rendered by the Impartial Jurisdictional Disputes Board shall be recognized and immediately implemented and such decision shall be binding on all parties to the dispute.”

4. Article 9.2 of the collective agreement binding on Comstock and the U.A. (the “U.A. Agreement”) provides:

“Jurisdictional disputes that may arise after the enforcement of this agreement shall be referred to either the Ontario Labour Relations Board (O.L.R.B.) or the Impartial Jurisdictional Disputes Board (I.J.D.B.) for a final and binding decision.”

5. The events which gave rise to this complaints are summarized as follows in a letter dated February 26, 1982 from Comstock to the I.J.D.B.”

“Our Company is engaged in the installation of a Paper Machine for Abitibi-Price Inc. This project is located in the Town of Iroquois Falls, Ontario, approximately 350 miles North of Toronto, Ontario.

Our Company held a pre-job conference on 1981-10-02 at which time installation of the steam dryer drums was awarded to the Millwrights. Following this meeting it became apparent that certain accessories, specifically steam and condensate joint and syphons were in dispute between the U.A. and Millwrights and following a further meeting on site the installation of these disputed items remained with the Millwrights. A copy of our letter confirming this is attached.

The installation of these items remain a highly disputed item and our Company is now suffering from a work slowdown by the Pipefitters and the issue remains unresolved. We have agreed to present this conflict to your committee and ask you to make a decision and assign this installation to the best of your ability. While we have awarded this to the Millwrights, we are totally impartial as to the assignment of this.

[The detailed description of the work contained in that letter, and the names of Company officials who could be contacted by the I.J.D.B. for further information have been omitted.]

We have not commenced the installation of any of these pieces and must now consider this work urgent as it has been delayed for several months. We ask you to advise us of your decision at your earliest opportunity but before March 30th, 1982.

Yours very truly,

COMSTOCK INTERNATIONAL LTD.,  
(signed E. R. Woerner, P. Eng.,  
Vice-President”

6. In response to that letter, the following letter dated March 3, 1982 was sent from the I.J.D.B. President's Office to Comstock, William Konyha (General President of the United Brotherhood of Carpenters and Joiners of America), and Martin J. Ward (General President of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry):

"This is in reply to the enclosed letter dated February 26, 1982 from Comstock International regarding the jurisdictional dispute between the United Brotherhood of Carpenters and Joiners and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry over installation of the steam dryer drums, Abitibi-Price Inc. Project, Iroquois Falls Ontario Canada.

This letter makes it clear that the original assignment of the steam and condensate joint and syphons was to millwrights. It also states that the work has been held up because of the jurisdictional dispute and that the pipefitters are engaging in a work slowdown because of this jurisdictional dispute.

Accordingly, in accordance with the Provisions and Procedural Rules of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, the following actions are indicated:

1. President Ward is requested to direct the pipefitters to immediately cease disrupting the progress of the project and to perform work as assigned.
2. Comstock International Ltd. is directed to cease delay of the disputed work and perform it as originally assigned.
3. The involved International Unions are requested to settle this jurisdictional dispute directly.

Very truly yours,

(signed) Dale R. Witcraft  
Chairman"

An "information copy" of that letter was also sent to the Millwright District Council of Ontario.

7. Mr. Witcraft's letter prompted the following reply, dated March 11, 1982, from Mr. Ward:

Dear Mr. Witcraft:

This is in reply to your letter dated March 3, 1982 regarding case CAN 3/3/82 and Comstock International's letter dated February 26, 1982 on a dispute between the United Brotherhood of Carpenters and the United

Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry over the installation of the steam dryer drums, Abitibi-Price, Inc. project, Iroquois Falls, Ontario, Canada.

The United Association takes exception to the claim by Comstock International that the original assignment of steam and condensate joint and syphons was to the Millwrights.

Based on the details of the Labor Planning Work Sheet of Comstock International the Pipe Fitters were assigned 85 hours' work on the internal piping associated with a rotary steam valve or head which is attached to a paper machine dryer rolls or drums.

As stated in the Procedural Rules, 8 working hours constitutes the original assignment, and this work sheet will clearly show a total of 85 hours as mentioned above. In accordance with the provisions of the Plan for the Settlement of Jurisdictional Disputes, we are requesting the Board to direct Comstock International, P. O. Box 900, Sudbury, Ontario, Canada P3A 4S2 to revert to the original assignment and have Pipe Fitters perform this work.

Very truly yours,

(signed) Martin J. Ward  
General President, UA"

Mr. Ward also caused copies of that letter to be sent to the U.A.'s Director of Canadian Affairs and to the Business Manager of U.A. Local 800.

8. On March 19, 1982, Mr. Witcraft forwarded to Comstock a copy of Mr. Ward's letter and requested the Company to "reply by return communication" regarding the statement contained in the third paragraph of Mr. Ward's letter, "as it relates to the original assignment in this jurisdictional dispute". (Mr. Witcraft also caused a copy of his letter to Comstock to be forwarded to Mr. Ward, Mr. Konyha and the Millwright District Council of Ontario.)

9. Comstock's response (dated March 30, 1982) was as follows:

"With reference to your letter of March 19th, 1982 in regard to the jurisdictional dispute between the United Brotherhood of Carpenters and Joiners and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry over installation of the steam dryer drums, please be advised that the labour planning work sheet showing 85 hours assigned to Pipefitters is not directly related to the subject. We comment as follows:

1. The document referred to (labour planning work sheet) is an internal Comstock document utilized for cost control purposes and is not used in any way to establish jurisdictions.



2. The operation in question relates to the handling and installation of flex hoses and related appurtenances that attach to or in the vicinity of the steam drums.

We trust the above information meets your requirements.”

Upon receiving that response, Mr. Witcraft wrote the following letter, dated April 1, 1982, to Mr. Ward:

“With further reference to our file CAN 3/3/82 and your letter of March 11, 1982 in the jurisdictional dispute between the United Brotherhood of Carpenters and Joiners and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry over installation of steam dryer drums, Abitibi-Price Inc project, Iroquois Falls Ontario Canada, the enclosed letter dated March 30, 1982 has been received from Comstock International Ltd.

This is for your information. Please advise.”

Copies of Mr. Witcraft’s letter were also sent to Mr. Konyha, the Millwright District Council of Ontario and Comstock. There is no evidence before the Board of any response to that letter by Mr. Ward.

10. It appears that at some point in the spring of 1982, Comstock stopped the work in question at the site due to pressure from the U.A. This prompted Mr. Konyha to send a telegram to Mr. Witcraft on April 16, 1982, requesting him “to again direct [Comstock] to proceed with work as assigned and notify President Ward to process jurisdictional dispute in accordance with [the I.J.D.B.’s] procedural rules.” Thereafter, it appears that the work in question was completed at Iroquois Falls. However, counsel for the complainant advised the Board that “the same issue will arise again at another mill in Dryden”.

11. Although there have been some informal discussions between representatives of the U.A. and Millwrights with respect to this jurisdictional dispute, it appears that there has not been a meeting of their respective designated jurisdictional representatives pursuant to section 91(4) of the Act. Moreover, there is no evidence before the Board that the U.A. has made a reasonable effort to comply with the I.J.D.B.’s request that it “settle this jurisdictional dispute directly” with the Millwrights.

12. In support of his contention that the Board lacks jurisdiction to hear this complaint, counsel for the Millwrights relied upon Article 9.2 of the U.A. Agreement and Article 14(b) of the Millwrights Agreement. The latter provision is clearly “a provision requiring the reference of any difference between [Comstock and the Millwrights] arising out of work assignment to a tribunal [the I.J.D.B.] mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement”, within the meaning of section 91(14) of the Act. However, the Board has held that for section 91(14) to be applicable, not only must the collective agreement binding upon the employer and one of the unions that is a party to the proceedings under section 91 contain such a provision, but so too must the collective agreement binding upon the employer and the other union that is a party to such proceedings (see *Mac J. Brian Mechanical Ltd.*, [1978] OLRB Rep. Nov. 1005). Thus, section 91(14) would only be applicable if Article 9.2 of the U.A. Agreement is also such a provision.

13. Under Article 9.2 (quoted earlier in this decision) of the U.A. Agreement, jurisdictional disputes must be referred to either this Board or the I.J.D.B. for a final and binding decision. It is apparent from Comstock's letter dated February 26, 1982 to the I.J.D.B. that the Company elected to refer this jurisdictional dispute to the I.J.D.B. (rather than to this Board) as it was entitled to do under Article 9.2. Comstock's decision to refer the matter to that body is quite understandable in light of the fact that the other union involved in this jurisdictional dispute is the Millwrights, whose Agreement requires that any jurisdictional dispute that arises between the Millwrights and any other Building Trades Union affiliated with the AFL-CIO Building and Construction Trades Department, such as the U.A., "be settled by submitting the dispute immediately to the Impartial Jurisdictional Disputes Board for a decision." In view of that provision, if Comstock had referred the matter to this Board rather than to the I.J.D.B., it would have been open to the Millwrights to contend that such action violated the Millwrights Agreement. It would also have been open to the Millwrights to urge this Board to exercise its discretion under section 91(1) to decline to hear the complaint, or to exercise its discretion under section 91(13) to postpone inquiring into a complaint under section 91 until the jurisdictional dispute had been dealt with in accordance with Article 14(b) of the Millwrights Agreement.

14. It may well be that Comstock's election to refer this jurisdictional dispute to the I.J.D.B. pursuant to Article 9.2 foreclosed the alternative that was originally open to the U.A. (and to Comstock) of referring that dispute to this Board, and thereby made Article 9.2, in the context of this particular work assignment difference, "a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement", within the meaning of section 91(14) of the Act. Moreover, even if we are not precluded from hearing this complaint by section 91(14), the Board is of the view that, in any event, this is an appropriate case in which to exercise our discretion under section 91(1) to decline to hear this complaint. In reaching this conclusion, we have taken into account not only the fact that referral of a jurisdictional dispute to the I.J.D.B. is one of the two mutually exclusive options to which the U.A. is bound by virtue of Article 9.2 of its Agreement, but also the fact that, as conceded by counsel for the U.A., Local 800 sought to "attorn to the jurisdiction of the I.J.D.B." by forwarding (through General President Ward) written submissions to that tribunal in an attempt to persuade it to direct Comstock to assign the work in question to the U.A. (As noted above, the U.A. based those submissions on "the details of the Labor Planning Work Sheet of Comstock International", an "internal Comstock document" to which one or more members of Local 800 would presumably have access through their employment with Comstock.) The U.A.'s submissions prompted the I.J.D.B. to seek further information from Comstock. Although counsel for the U.A. contended that the I.J.D.B.'s present approach to jurisdictional matters is inadequate, we note that despite this alleged inadequacy, the U.A. nevertheless sought to satisfy the I.J.D.B. initial work assignment criteria so as to obtain an award of the work from that tribunal. We also note that there is no evidence that the U.A. has made all reasonable efforts to comply with the I.J.D.B.'s request that it "settle this matter directly" with the Millwrights. Whatever the situation might have been if the U.A. had come directly to this Board rather than first attempting to persuade the I.J.D.B. to direct Comstock to award the work in question to it, and then filing a section 91 complaint only after it had failed to obtain the desired direction from that tribunal, we are of the view that in the circumstances of this case, we ought not to inquire into the U.A.'s complaint.

15. Counsel for the U.A. contended that the Board should exercise its discretion to hear this complaint on the merits since the I.J.D.B. is no longer functioning. Although counsel for the Millwrights agreed with counsel for the U.A. that "the I.J.D.B. does not make job decisions" of the type which it "used to give", and stated that he was "prepared to admit for the purpose of these proceedings that the procedural rules are as far as the I.J.D.B. goes", he nevertheless contended that the correspondence filed with the Board in these proceedings clearly indicates that the I.J.D.B. is "still functioning".

16. The documentation filed with the Board in respect of this matter indicates that the I.J.D.B. accepted the referral of this jurisdictional dispute to it by Comstock, issued a direction to Comstock "to cease delay of the disputed work and perform it as originally assigned", requested the involved unions to settle this dispute directly, sought further information from Comstock in view of the written submissions which it received from the U.A., forwarded to the U.A. (and the Millwrights) Comstock's reply, and sought the U.A.'s response to that reply. In view of that documentation and in the absence of any concrete evidence that the I.J.D.B. has gone out of existence or ceased to function, there is no substantiation for the U.A.'s allegation that the I.J.D.B. has ceased to operate. As stated by the Board in *Ontario Hydro*, [1982] OLRB Rep. Feb. 248, at paragraph 14, "while the IJDB does have certain very real advantages, most notably speed, it does have its own disadvantages, including the fact that it is prone to operational difficulties". (A request for reconsideration of that decision was denied by the Board on March 29, 1982.) See also *Dominion Bridge Company Ltd.*, [1982] OLRB Rep. May 667, in which Board Members H.J.F. Ade and C.A. Ballentine, in a concurring opinion, observed that "the 'I.J.D.B.' and its predecessor the 'National Joint Board for the Settlement of Jurisdictional Disputes' has been in a state of flux and disarray for a decade or more." Trade unions and employers which are active in the construction industry are presumably familiar with the advantages and disadvantages of the I.J.D.B. and can take those factors into account when they decide whether or not to agree to include language in their collective agreements providing for jurisdictional disputes to be submitted to the I.J.D.B. for "final and binding decision". If the parties to such agreements are not satisfied with the performance or operating methods of the I.J.D.B., it is always open to them to revise their collective agreements so as to require jurisdictional disputes to be referred to this Board or to such other tribunal as they deem appropriate.

17. For the foregoing reasons, this complaint is hereby dismissed.

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**2661-81-R; 2662-81-U** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, Applicant/ Complainant, v. **Emrick Plastics Inc.**, Respondent

Sale of a Business – Unfair Labour Practice – Employer bound by collective agreement selling business – Whether successor employer must employ all of predecessor's employees – Whether permitted to employ selectively – Whether bound to recognize rights and benefits accrued under predecessor's collective agreement

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and S. Cooke.

**APPEARANCES:** *L. A. MacLean Q.C., J. P. Dias, S. Weiko and S. Raymont for the applicant/complainant; James N. Bartlet and Peter Emanuel for the respondent.*

**DECISION OF THE BOARD;** June 23, 1982

1. The name of the respondent is amended to read: "Emrick Plastics Ltd."
2. These consolidated proceedings involve an application under section 63 of the *Labour Relations Act*, together with a complaint under section 89 of the Act. It is common ground that both matters depend upon the interpretation of section 63(2) of the Act as to its effect on employees' rights under a collective agreement, and the Board accordingly ruled that it would deal with that threshold issue first.
3. On or about March 1, 1982, the business of Emrick Plastics Limited in Windsor was sold to new owners who incorporated a company with the name Emrick Plastics Inc. The numbered company initially named as a respondent was used solely as an interim device by the purchasers pending completion of the transaction, and is not material to these proceedings. The respondent purchaser acknowledged from the outset that it had engaged in a "sale of a business" within the meaning of section 63 of the Act, and advised the applicant trade union that it recognized its continuing status as bargaining agent, and that it was bound by the applicant's collective agreement. The respondent insisted, however, that it was under no obligation to hire any of the predecessor company's employees, and that the seniority and service of any of these employees that it did hire dated only from the point of such hire. The applicant has filed a number of grievances under the collective agreement arising out of this form of treatment of the employees of the predecessor, and it is essentially the same issues contained in the grievances which form the subject matter of the section 89 complaint.
4. The business at the time of the sale was in the hands of a Receiver, Peat Marwick, appointed under the terms of a debenture by the vendor company's bank. The respondent replied to an invitation to tender by the Receiver, and its offer was accepted on or about February 5, 1982. The respondent advised the Board that the Receiver posted notice of termination to all employees at the plant on or about February 12th. The respondent initially failed to produce at the hearing a copy of the said notice. When the respondent did eventually produce that notice, it turned out to be something well short of notice of termination. The notice simply reads:

February 12, 1982

*TO THE EMPLOYEES OF EMRICK PLASTICS LIMITED*

Pursuant to our appointment as Receiver and Manager of Emrick Plastics Limited, please be advised that we have accepted an offer to sell the assets of Emrick Plastics Limited. We anticipate that this transaction will be completed no later than February 26, 1982.

Signed,

PEAT MARWICK LIMITED  
Receiver and Manager of  
EMRICK PLASTICS LIMITED.

At the same time a representative of the Receiver met with representatives of the applicant, and confirmed that a sale had taken place. The Receiver offered to answer any questions employees might have as to vacation or severance pay, but made it clear that employees would have to deal with the purchaser on any matters which would arise subsequent to the transfer of operations.

5. On February 23rd Peter Emanuel, the respondent's General Manager, received permission from the Receiver to post the following notice on the plant's bulletin board:

*NOTICE*

504339 ONTARIO INC. HAS AGREED TO ACQUIRE THE ASSETS OF EMRICK PLASTICS LIMITED AND WILL COMMENCE OPERATIONS ON MARCH 1st, 1982.

504339 ONTARIO INC. WILL BE INTERVIEWING APPLICANTS ON THURSDAY MORNING BETWEEN 10 AM AND 12 NOON (2-25-82). PERSONNEL PREVIOUSLY EMPLOYED BY EMRICK PLASTICS MAY APPLY AT THAT TIME.

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P.R. EMANUEL  
for 504339 ONTARIO INC.

The applicant immediately expressed to the respondent its concern over the position being taken with respect to the rights of existing employees, and delivered to the respondent a letter outlining its own position. In particular the letter stated:

... We are particularly concerned with the notice which you posted on February 23, 1982 in the plant calling for applications for employment. This action is clearly a violation of the existing Collective Agreement which does not expire until October 1, 1982.

The respondent, however, proceeded with its interviews on the 25th as planned. Some 60 to 70

employees either employed in the plant at the time or on layoff attended for an interview, and each one filled out an "Application for Employment" as required by the respondent. Each employee was told that no decision would be made until all employees had been interviewed, and that employees would be contacted on the weekend if they were to report for work with the respondent on Monday, March 1st. That is in fact what happened, although additional employees of the predecessor have been contacted to commence working for the respondent in subsequent weeks as well. When employees did commence employment with the respondent, they filled out new TD1 forms as required by the respondent. It appears generally that the respondent filled its employment complement from within the ranks of the predecessor's employees, although, as noted earlier, without regard to seniority accumulated with the predecessor.

6. Whether or not individual employees were hired by the respondent, the Receiver caused separation certificates ("Records of Employment") to be completed and issued for all employees on the predecessor's payroll list as of February 26th, in accordance with the Receiver's normal practice and its understanding of the requirements of the *Unemployment Insurance Act* when a transfer of a business takes place. The reason for separation was shown in each case as "Assets of business sold". Prior to the closing date for the transaction, the solicitors for the respondent requested and obtained from the Receiver the following undated undertaking:

TO: 504339 Ontario Inc.

AND TO: Bartlet & Richardes,  
their solicitors  
herein

RE: separation slips —  
employees of Emrick  
Plastics Limited

Dears Sirs:

This is to confirm that Emrick Plastics Limited will provide separation slips to the employees of Emrick Plastics Limited as at February 26th, 1982.

Yours very truly,

PEAT MARWICK LIMITED Receiver,  
Manager and Agent of Emrick  
Plastics Limited

PER: \_\_\_\_\_  
R. QUINNEY

These separation certificates were not actually mailed to employees, however, until a few days *after* the sale transaction had closed, and no monies for vacation or termination pay (as calculated on the separation certificates) were enclosed at that time. All employees have since been paid their required vacation pay, but none have been paid termination pay.



7. As noted, the position of the respondent was and is that it was under no obligation to apply the terms of the collective agreement to any of the predecessor's employees until such time as it decided to hire them, and that even in that case employees were entitled to no credit for either service or seniority with the predecessor. The respondent acknowledges that a successor employer under the *Labour Relations Act* takes the business as he finds it, but argues that by the same token, the successor is entitled to the benefit of employees of the predecessor having been properly terminated prior to the transfer of operations taking place. After the evidence was heard, counsel for the respondent took the position that it was irrelevant insofar as it affects the respondent whether the employees were "properly" terminated prior to the sale; it was sufficient that the respondent had acted on the basis of the Receiver's undertaking that they *would* be terminated.

8. The Board had serious doubts whether the evidence has demonstrated any termination of employment taking place prior to the completion of the sale. The only notice to employees which comes close is the notice from Mr. Emanuel, and that notice came from the respondent, not the employees' employer at that time. The respondent places great reliance on the "understanding" and actions of the employees in the days prior to the sale, but it must be borne in mind that this "re-employment" process was one which was being forced upon the employees by no one but the respondent itself. The more critical question, however, is whether the obligations of the respondent do turn, as the respondent submits, on either the actual or purported termination, prior to the sale, of individuals employed by the predecessor.

9. Section 63 of the Act provides:

63.-(1) In this section,

- (a) "business" includes a part of parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

Again, as noted, the respondent does not dispute the continued bargaining rights of the applicant, nor the binding effect of its collective agreement. But it submits that there is no authority in Ontario for the proposition that a successor employer must hire terminated employees of its predecessor. It argues, for example, that a company could go out of business, terminate and pay off all of its employees, and then, perhaps months later, the business might re-open in the hands of a purchaser. The respondent submits that there is nothing in law which at that later date would re-establish the employment relationship. On the contrary, the respondent relies on a number of cases in this and other jurisdictions in support of its submission that

the successor employer is free to hire only those employees of the predecessor whom it sees fit, and that the rights of those employees with the successor date only from the time of such hire. The respondent points for additional support to section 13 of the *Employment Standards Act*, which reads:

13.-(1) In this section,

- (a) “business” includes an activity, trade or undertaking, or a part or parts thereof;
- (b) “sells” includes leases, transfers or any other manner of disposition and “sale” has a corresponding meaning.

(2) Where an employer sells his business to a purchaser who employs an employee of the employer, the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI and XII.

(3) Where an employer sells his business to a purchaser who does not employ an employee of the employer, the employer shall comply with Part XII.

This section, the respondent argues, clearly contemplates that there are employees of a predecessor employer which a purchaser will *not* hire.

10. The Board finds that the authorities cited do not support the proposition which the respondent seeks to establish. In *Vaunclair Meats*, [1981] OLRB Rep. May 581 and *Prudent Investments*, [1981] OLRB Rep. Nov. 1611, the respondent argues that the reference to a “like” bargaining unit, rather than the “same”, recognizes that the actual employees of the successor may be different. These are words found only in section 63(3), however, which has no application to an existing collective agreement. And even so, that subsection appears to connote no more than a change in the *description* of the unit, in terms of the employing party, rather than in the identity of the employees themselves. Similarly, in *Sunnylea Foods*, [1981] OLRB Rep. Nov. 1640, and *Winchester Press*, [1982] OLRB Rep. Feb. 284, the respondent argues that the inquiry into, for example, anti-union *animus* establishes that a purchaser of a business would, apart from such considerations, be under no obligation to hire employees of the predecessor. But the respondent in its argument fails to note that in those cases the trade union’s bargaining rights had not yet materialized into a collective agreement. In those circumstances it was clear that the only restrictions on a successor employer’s right to hire arose out of the unfair labour practice sections, such as 66 and 79, of the Act.

11. The respondent also relies on the Board’s decision in *Bermay Corporation*, [1979] OLRB Rep. July 608. In that case, the successor employer, Bermay, prior to the sale already had its own (non-union) operation at a separate location in Toronto. It purchased a second company, Goldcrest, whose employees were unionized and covered by a collective agreement. Goldcrest gave notice of termination under the *Employment Standards Act* to all of its employees as a result of the sale. Bermay then moved all of its existing employees, some 26 in number, into the Goldcrest building, and hired 24 of the 40 former Goldcrest employees who

applied for employment. It also hired 20 additional employees from outside. All of the employees were then intermingled. The fact that new employees were hired in preference to some of the former Goldcrest employees who applied is in fact consistent with the position put forward by the respondent, and it is that point upon which the respondent relies. For whatever reason, however, no issue arose before the Board as to the rights of former Goldcrest employees to be hired pursuant to the provisions of their collective agreement. One reason for this may be that, because of the intermingling, it could not be said that the collective agreement applied at all until the wishes of the employees in fact hired into the amalgamated unit had been tested. This the Board did by way of a representation vote, and it was not until the majority of employees had voted in favour of trade union representation that the rights of the parties could be defined by the Board.

12. The Board at that point was faced with the argument of the employer Bermay that the result of the representation vote caused only the trade union's bargaining rights to survive, and not the collective agreement. In finding that the collective agreement *did* survive, and that it applied without interruption from the date of the sale, the Board made some comments that are not without significance for the issue before us now. Referring to the "sale of business" legislation originally enacted in this province, the Board observed:

16. The legislation kept the collective agreement and a union's bargaining rights distinct. What survived the sale of a business was the union's right to bargain on behalf of the employees in a bargaining unit like the unit described in the prior collective agreement or in an outstanding certificate. In other words, the union found itself in the same position as a newly certified union. The result was that the employees were then subject to having their terms and conditions of employment negotiated anew. The employees were not protected by the operation of what was then section 59 (now section 70), from changes in their terms and conditions of employment until the union gave the new employer notice of its desire to bargain. The collective agreement ended and the continued entitlement of the employees to have their contracts of employment unchanged depended on how quickly their union gave its notice to bargain. In the result, there was considerable insecurity surrounding the rights of employees as to their terms and conditions of employment if the business was sold to a new employer. And most importantly, the sale of the business effectively terminated the collective agreement.

17. That was radically changed by an amendment of the section seven years later. *The Labour Relations Amendment Act, 1970* (No. 2), S.O. 1970, c. 85, s. 22 replaced the above section with what is now section 55(2):

"Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom



the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application”.

18. The section as it now stands *stabilizes the status quo from the moment of the sale* and gives more security to employees and their union. Under the present provisions of section 55, the first question is whether the sale of a business has occurred. A determination by the Board that a sale or transfer has occurred within the meaning of section 55 of the Act means that the collective agreement continues in force *without interruption*, binding the new employer just as it did his predecessor. *There is no hiatus in the operation of the collective agreement and no room for the unilateral imposition of changes.* The successor employer is obliged to observe the terms of the agreement in relation to all of the employees who come under it until the Board otherwise declares.

[emphasis added]

See *Bermay Corporation*, [1980] OLRB Rep. Feb. 166.

13. The next issue to arise for Bermay in that complicated matter was the respective seniority rights of prior “Bermay” versus prior “Goldcrest” employees, according to the provisions of the collective agreement which the Board found had continued to apply. This issue was in fact referred to arbitration, being a matter of interpreting the seniority language of the collective agreement. The Board of Arbitration, it must be noted, was not dealing with the rights of a single group of seniority employees to continue in employment, but rather with the equally balanced claims of competing groups of employees, and the Arbitration Board’s efforts to arrive at an equitable solution are understandable. Its conclusion on page 6 of its award (issued May 1, 1981), that:

... the Legislature must be taken to have intended Section 55(2) to bind a purchaser to the terms of the Collective Agreement, in respect of persons employed by the purchaser in the bargaining unit defined by the Agreement, as though the purchaser and the union had entered into a contract having the terms of the Collective Agreement *and dated the day on which the sale closed*,

must be read in the light of its ultimate finding that employees in the combined unit were entitled to recognition by Bermay of their seniority accumulated with either Bermay *or* Goldcrest, and more importantly, in the light of the recent Ontario Supreme Court decision in *Cassin-Remco*, (1980) 105 D.L.R. (3d) 138. There the issue before the Court was the enforceability of an arbitration award made under the collective agreement of a bankrupt company, against a subsequent purchaser of the bankrupt’s business. In holding that the purchaser effectively becomes bound by the collective agreement for the purpose of violations occurring even *prior* to the sale, the Court stated (at page 142):

... The provisions of s. 55 of the *Labour Relations Act* make it clear that the person to whom the business has been sold is bound by the collective agreement as if he had been a party thereto.

• • •

I am of the opinion that the *Labour Relations Act* creates a special status for collective agreements outside the purview of the general law.

Section 55 of the *Labour Relations Act* provides that the purchaser of a business shall be deemed to be the original signatory to the collective agreement. Therefore, both the union and the purchaser are bound by the terms of the agreement including its benefits and detriments. A benefit may be wage rates differing from those prevailing in the industry. A detriment may be an outstanding grievance or, in this case, an execution filed as a result of an arbitrator's award. In other words, the terms and conditions of a labour agreement flow with the business and once the purchaser has acquired the business then he is obligated to all of the matters that are included within it.

See also the Board's own discussion of this issue in *Sunnylea Foods*, [1981] OLRB Rep. Nov. 1640, and *Winchester Press*, [1982] OLRB Rep. Feb. 284, at paragraph 49.

14. The other cases upon which the respondent relies and which appear to deal with the issue before the Board are a group of decisions emanating from the British Columbia Labour Relations Board. See *Kelly Douglas*, [1974] 1 C.L.R.B.R. 77, and again at 426; *M. Pruden and B.C. Assessment Authority*, [1976] 1 C.L.R.B.R. 138; quashed 69 D.L.R. (3d) 713 (B.C.S.C.). The respondent submits that these cases acknowledge the impotence of a Labour Relations Board, under legislation similar to our own, to continue the employment of employees affected by a sale of a business. The respondent submits that the successor provisions of the British Columbia Labour Code were subsequently amended, in contrast to our own, specifically to deal with that shortfall in the legislation.

15. The Board does not agree. A reading of those cases makes it clear that the British Columbia Labour Relations Board stated no more than that the "sale of business" provisions of the Code do not prevent a purchaser from rationalizing his operations and reducing *the number of jobs available*, as he sees fit. In the initial *Kelly Douglas* decision, for example, the Board stated, at page 85:

... There is no warrant in the Code for a requirement that all of the previous jobs in these two warehouses be preserved. Even if there had only been one legal entity involved in this case, and the one employer had chosen to integrate two separate operations to achieve greater efficiency and economy, there is nothing in the Act which prohibits it from laying off employees as a result...

Section 53 of the *British Columbia Labour Code* reads:

53.(1) Notwithstanding the provisions of this section, where a business or part thereof, or a substantial part of the entire assets thereof, are sold, leased, transferred, or otherwise disposed of, the purchaser, lessee, or transferee is bound by all the proceedings under this Act before the date of the sale, lease, transfer, or other disposition, and the proceedings shall continue as if no change had occurred; and, where a collective agreement is in force, that agreement continues to bind the purchaser, lessee, or transferee to the same extent as if it had been signed by him.

(2) Where a question arises under this section, the board, on application by any person, shall determine what rights, privileges, and duties have been acquired or are retained, and, for this purpose, the board may make such inquiry or direct that such representation votes be taken as it considers necessary or advisable.

(3) The board, having made an inquiry or having directed a vote pursuant to this section, may

- (a) determine whether the employees constitute one or more units appropriate for collective bargaining;
- (b) determine which trade-union shall be the bargaining agent for the employees in each such unit; and
- (c) amend, to the extent the board considers necessary or advisable any certificate issued to a trade-union or the description of a unit contained in a collective agreement.

Like *Bermay Corporation, supra*, *Kelly Douglas* was a case of intermingling existing employees of the vendor with those of the purchaser, and in that context, again, although at an earlier stage than in *Bermay*, a major issue which arose was the respective seniority rights of the two groups of competing employees. As the Board went on to state:

A much more difficult issue is how the existing collective agreements control the selection of those who will lose their jobs and what the effect of the Kelly Douglas takeover will be on the Malkin employees who are to be retained.

It was *this* issue on which the Board indicated it was powerless to effect any equitable modification to the governing terms of the collective agreement, and to this issue which the Legislature of British Columbia subsequently addressed itself in adding subsections (d) and (e) to section 53, which read:

53.-(3) The Board ... may ...

- (d) modify or restrict the operation or effect of a provision of a collective agreement in order to define the seniority rights under it of employees affected by the sale, lease, transfer or other disposition; and
- (e) give directions the board considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees in a unit determined under this section to be appropriate for collective bargaining.

16. Nowhere in the *Kelly Douglas* decisions did the B.C. Board suggest that a successor employer was free to select its employment complement free from the provisions of the governing collective agreement. On the contrary, that Board in *M. M. Pruden, supra*, stated, at page 143:



... On the other hand, it is implicit in s. 53, and in the reasoning of Chairman Weiler in *Kelly Douglas*, that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".

The Board's ultimate decision in *Pruden* was quashed on an application for judicial review, but only because the Court found a repugnancy between section 53 of the *Labour Code* and the overriding *Assessment Authority of British Columbia Act*, a piece of special legislation passed to govern the specific transaction before the Board in that case. Indeed, it was precisely the passage quoted above from the Board's decision which satisfied the Court of the repugnancy between the normal impact of section 53 of the Code and the special provisions of the *Assessment Authority Act*, which explicitly granted the new Authority the discretion to designate those employees whom it wished to hire.

17. The interpretation given to its successorship legislation by the British Columbia Labour Relations Board makes eminent good sense to this Board as well. Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section 63 of our own Act intended that the rights of the bargaining agent selected by the employees would "run with the business" (cf., for example, *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733), that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion. The only tangible difference in the language of the B. C. Code in its material provisions is that the British Columbia statute says:

... where a collective agreement is in force, it continues to bind the purchaser... to the same extent as if it had been signed by him.

whereas our own statute says:

... the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement, as if he had been a party thereto.

But the words of the Ontario Supreme Court in *Cassin-Remco*, *supra*, paraphrasing our statute to say that "the purchaser of a business shall be deemed to be the *original* signatory to the collective agreement" leave no doubt (if there was any) that this is a distinction without a difference.

18. We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by

employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business *exactly* as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement than the *vendor* would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off.

19. The only authority cited which might be read to suggest otherwise is the decision of a board of arbitration in *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Shime), where the board directed its attention to whether employees of the vendor had been properly terminated prior to the sale. But there is no indication whether the bartenders in that case even *had* recall rights under their collective agreement, and that case does state clearly that employees could not be discharged under the collective agreement by *either* employer without “reasonable cause”. Having found no attempt to have been made by the vendor to terminate any of its employees, the board did not have to consider, nor does it appear to have been argued, what the effect of recall rights might have been when the business was re-opened by the purchaser.

20. Similarly, section 13 of the *Employment Standards Act*, in dealing with a sale of a business, simply does not address itself to the issue before the Board. That section is written, of course, to cover situations both with and without a collective agreement, and even where a collective agreement *is* in place, there is nothing in the successorship provisions of the *Labour Relations Act*, as the British Columbia Board noted as well in *Kelly Douglas and Pruden, supra*, which prevents a purchaser from reducing the number of jobs the business has to fill. There may, in either situation therefore, be employees of an employer whom a purchaser “does not employ”, and the words of the section simply reflect this.

21. This Board now having rendered its decision on the effect of section 63 of the *Labour Relations Act*, the only matter remaining to be dealt with under either the section 63 application or the section 89 complaint before us is the interpretation of the collective agreement itself, as it applies to the specific employees who have grieved. There appears to be no reason, nor was any put forward, why these matters cannot now be dealt with in the normal way, by arbitration under the collective agreement, in the event that the Board’s decision on the “threshold” issue does not, as anticipated, resolve all of the remaining issues between the parties. For a full discussion of the Board’s policy of deferral, see *Valdi Foods*, [1980] OLRB Rep. Aug. 1254, and the cases cited therein.

22. On the basis of the foregoing, the Board rules and declares that the respondent, by virtue of the provisions of section 63(2) of the *Labour Relations Act*, continues to be bound to the former employees of the vendor, Emrick Plastics Limited, under the terms of the instant collective agreement in the same way that Emrick Plastics Limited would have been, and that the respondent is accordingly required to recognize all rights and benefits which accrued to those employees under the collective agreement during their period of employment with Emrick Plastics Limited. Apart from this declaration, however, the Board declines to proceed further with the complaint and application.

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**2585-81-R** Labourers' International Union of North America, Local 1089, Applicant, v. **Great Lakes Fabricating**, a Division of Glascar Ltd., Respondent, v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915, Intervener

**Certification – Collective Agreement – Construction Industry – Employer member of Sarnia Construction Association – Association entering into agreement with intervener – Whether employer bound by that agreement – Whether intervener having status to intervene**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**APPEARANCES:** *B. Fishbein and R. D'Andrea for the applicant; No one appeared for the respondent; L. C. Arnold and L. Fannelli for the intervener.*

**DECISION OF THE BOARD;** June 3, 1982

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The matter was set on for hearing with two other cases involving the intervener and the respondent. One, a section 89 complaint, and the other a referral of a grievance to arbitration under section 124 of the Act. At the hearing, however, only the application for certification was dealt with.
3. The applicant trade union has applied for a bargaining unit consisting of construction labourers and employees engaged in cement finishing, waterproofing or restoration work. The intervener has intervened on the basis of a collective agreement between it and the respondent relating to cement finishers, waterprooferers and restoration employees. The applicant denies the validity of such a collective agreement and any collective bargaining relationship between the respondent and the intervener. At the hearing the Board heard the evidence and representations on this specific issue concerning bargaining rights, and accordingly the status of the intervener to appear in these certification proceedings.
4. The facts upon which the matter of the intervener's status was argued are fairly straight forward and not in dispute. The respondent employer is a Sarnia area contractor and since 1961 it has been a full member of the Sarnia Construction Association. The Sarnia Construction Association has a very specific provision in its by-laws. We refer in particular to by-law number 1 dated July 11, 1948, which reads as follows in section 1:

“Members

1. The subscribers to the Memorandum of Agreement of the Corporation shall be the first members and it shall rest with the directors to determine the terms and conditions on which subsequent members shall from time to time be admitted.
- (a) There shall be two categories of membership within the SARNIA CONSTRUCTION ASSOCIATION known as “MEMBERS” and “ASSOCIATE MEMBERS”.



A "MEMBER" organization shall be bound by all the terms and conditions of all labour agreements entered into and signed in the name and title of the SARNIA CONSTRUCTION ASSOCIATION.

An "ASSOCIATE MEMBER" organization shall have completely equal status in all the business, functions and aims of the SARNIA CONSTRUCTION ASSOCIATION, except that "ASSOCIATE MEMBERS" will be excluded from being bound by any labour agreement entered into and signed by the SARNIA CONSTRUCTION ASSOCIATION.

- (b) An applicant organization shall declare on the form of application for membership, which category of membership he desires to enroll in.
- (c) The Directors shall decide into which category of membership an applicant organization shall be enrolled.
- (d) The directors shall rule during each general meeting as to the eligibility of each category of membership to debate, and or vote, on any subject related to the labour relations policy or the SARNIA CONSTRUCTION ASSOCIATION.

In a general way, only MEMBERS shall debate and vote on any motion having to do with labour relations and the acceptance or rejection of any terms of agreement.

- (e) The Directors may submit to any general meeting a proposal to call for the resignation from the SARNIA CONSTRUCTION ASSOCIATION of any organization, which in the majority opinion of the general membership, has been found to have failed to adhere to the general principles and ethics of the Association, as defined in the charter. In no instance shall such action take place until the organization concerned has had the opportunity to present its case to a meeting of the Directors."

There is no question that the respondent in the present case is a member within the meaning of 1(a) of the by-law and further that in an annual publication of the Sarnia Construction Association which is a Membership and Trade Directory, the respondent has for many years now been listed and designated as a full member rather than an associate member in that directory.

5. The evidence is also clear that for a number of years the Sarnia Construction Association has bargained on behalf of its members with the various trade unions loosely referred to as the "civil trades" which include the carpenters, operating engineers, labourers, teamsters, cement finishers and bricklayers. This pattern existed prior to the advent of province-wide bargaining in the construction industry, although, for some time prior to that the bricklayers had been bargaining provincially and the Sarnia Construction Association had ceased to bargain for bricklayers.

6. The position taken by the applicant is that there is no collective agreement between the respondent and the intervener because there is neither a certificate creating bargaining rights, nor an individual collective agreement, nor a list of contractors transferred by the Sarnia Construction Association to the union. While it is clear on the facts that there is no individual collective agreement between the intervener and the respondent, and it is not disputed that there is no certificate, the evidence is clear that the respondent was bound by the bargaining of the Sarnia Construction Association prior to the commencement of province-wide bargaining in 1978.

7. In this regard, the by-law setting out the position of membership in the Sarnia Construction Association could not be clearer. Since 1961, the respondent had been bound by that by-law and indeed listed as a member of that organization. There can be no doubt that from the period from 1961 through 1978, the Sarnia Construction Association was very specifically bargaining upon the behalf of the respondent amongst others.

8. Although there is no doubt that the respondent has observed the collective agreement with the intervener, this is not a case, as suggested by the applicant, where it is alleged that bargaining rights are created by the mere observance of a collective agreement. Rather we are satisfied that section 51 subsections (1) and (2) have from 1961 on, been complied with in such a manner as to make the agreement binding on the respondent. Section 51(1) and (2) read as follows:

“(1) A collective agreement between an employers’ organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers’ organization and each person who was a member of the employers’ organization at the time the agreement was entered into and on whose behalf the employers’ organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers’ organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.”

“(2) When an employers’ organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers’ organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers’ organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers’ organization and the trade union or council of trade unions.”

In the present case, not only is the annual booklet produced by the Sarnia Construction Association, a list of employers sufficient to comply with subsection (2) referred to above, but there is no evidence that the respondent has at any time claimed not to be bound by the agreement and notified the intervener of such a refusal to be bound. Therefore, it is clear that the respondent is bound by a collective agreement with the intervener. We therefore find that the intervener has status to intervene in these proceedings.

9. On the foregoing facts, we have found that the respondent is party to the collective agreements made by the Sarnia Construction Association prior to 1978. Since that time, of course, the respondent has been bound to the appropriate provincial agreements. Those agreements not only involve the intervener, they of course, involve the applicant. From the evidence of Mr. Pilat, General Manager of the Sarnia Construction Association, it would appear that the applicant also has a collective bargaining relationship with the respondent for Labourers.

10. In view of the foregoing, the Registrar is directed to list this matter for continuation of hearing on all outstanding matters, including the appropriate bargaining unit in the present case.

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**2014-81-R** International Ladies' Garment Workers' Union, Applicant, v. **Harwill Originals Limited**, carrying on business under the registered name and style of Golden Crown Sportswear, and Rosengarten, Freedman Knitting Co. Ltd., carrying on business under the registered name and style of Golden Crown Knitting Co., Respondents

**Certification – Related Employer – Employers not precluded from making related employer application – Certification application restricted to one corporation – Board treating two corporations as single employer**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

**APPEARANCES:** *S. B. D. Wahl, H. Stewart, R. Sutherland for the applicant; C. E. Humphrey and W. Rosengarten for the respondent.*

**DECISION OF THE BOARD;** June 24, 1982

1. This is an application for certification in which the Board issued an earlier decision on January 26, 1982.

2. The applicant seeks to be certified as the bargaining agent for certain employees of Harwill Originals Limited, which carries on business under the registered name and style of Golden Crown Sportswear. It is the position of the respondents, however, that Harwill Originals Limited and Rosengarten Freedman Knitting Co. Ltd., which carries on business



under the registered name and style of Golden Crown Knitting Co., should be treated as a single employer for the purposes of the *Labour Relations Act*, and that the bargaining unit be described so as to encompass the employees of both companies. In support of this position the respondents rely on section 1(4) of the Act which provides as follows:

“Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

3. At the commencement of the hearing, counsel for the applicant contended that since section 1(4) does not make any reference to an application being made under the section by an employer, it follows that the section cannot be invoked by the respondents. The Board orally rejected this contention. Section 1(4) states that an application can be made under the section by “any person, trade union or council of trade unions concerned”. If the legislature had desired to limit applications under the section only to trade unions and councils of trade unions, it would not have also made provision for an application to be made by “any person”. By virtue of the *Interpretation Act*, a “person” can include a “corporation” or other similar legal entity which can act in the capacity of an employer. Accordingly, we are satisfied that the respondents, being corporations and thus, at law, “persons” are entitled to bring an application under section 1(4). In this regard see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. March 247, and *Forest Public House*, [1974] OLRB Rep. Jan. 40.

4. Rosengarten Freedman Knitting Co. Ltd. is owned by Mr. William Rosengarten, Mrs. Freda Freedman and their children. Mr. Rosengarten and Mrs. Freedman are the only two officers of the firm, and they along with Mr. L. B. Heath are its Directors. Harwill Originals Ltd. is owned by Rosengarten, Freedman Knitting Co. Ltd. Mr. Heath, Mr. Rosengarten and Mrs. Freedman are the Directors of Harwill Originals Ltd. while Mr. Rosengarten and Mrs. Freedman are its only officers. Mr. Rosengarten is the president of both companies.

5. Although Rosengarten, Freedman Knitting Co. Ltd. was only incorporated on January 1, 1965, Mr. Rosengarten testified that the firm began operations in 1953 as a knitting company. According to Mr. Rosengarten, the company, at one time was knitting sportswear and this led him in 1967 to decide to also go into the sportswear business. Mr. Rosengarten testified that Harwill Originals Limited was incorporated to do the sportswear, as opposed to simply starting a separate department within the Rosengarten Freedman Knitting firm, because originally another person had a part-interest in the sportswear operation. The interests of this other person were bought out by Rosengarten, Freedman Knitting Co. Ltd. after about a year. The sportswear operations began at either 165 or 167 John Street in Toronto whereas at about that time the knitting operation was moved from elsewhere in the city to 179 John Street. At some point in the early 1970's the sportswear operation was also moved to 179 John Street.

6. Harwill Originals Limited leases the fifth floor at 179 John Street. The floor is used primarily for the manufacture of sportswear. Rosengarten, Freedman Knitting Co. Ltd. leases the sixth and seventh floor at 179 John Street. The seventh floor is used for knitting operations. The sixth floor contains office space and a shipping room which serve both the knitting and sewing operations. The office staff on the sixth floor takes care of the accounts receivable and payroll for both companies, although separate accounts are used. The same mechanics are responsible for the maintenance and repair of both sewing and knitting machines.

7. As already indicated, both corporations carry on business under the "Golden Crown" name. A single phone number is used for both operations. The same salesmen carry the products of both companies, although they also handle the lines of other unrelated firms. The respondents do very little advertising, but when they do it is by way of advertisements under the name of "Golden Crown Knitwear and Sportswear". If a customer places an order covering both knitwear and sportswear, both types of garments will be shipped out together with one bill of lading. For small orders, both types of garments will be placed in the same box. Separate invoices are sent covering knitwear and sportswear, although at times the two invoices will be sent in the same envelope. Customers often pay for both knitwear and sportswear with a single cheque.

8. The sportswear operation makes a number of items including jackets, pants and shorts from cloth purchased elsewhere. Employees cut out the required pieces from the cloth, and these in turn are sewn into garments. In the knitting operation, yarn is first knit into pieces of fabric. From this knitted fabric pieces are cut out and then sewn into finished garments. In the past certain items for sportswear were knitted on the seventh floor, although apparently this is no longer being done.

9. On occasion, goods started on one floor are transferred to be finished on the other floor. An example given at the hearing was the taking of knitwear to the sportswear area to have button holes made. A much more common practice has been to temporarily transfer employees between floors, either because of a need for extra help in one area, or because there is not enough work to keep employees busy in the other area. Some transfers have been for a month or more, others for a day or two, and still others for only an hour. Some employees, however, have never been transferred at all. Unfortunately, no records have been kept of these transfers, and the evidence as to the number of transfers was somewhat less than precise. The evidence when taken as a whole, however, appears to support Mr. Rosengarten's estimate that about seventy per cent of the time, one person will be temporarily working on another floor.

10. There is a schedule under the *Industrial Standards Act* covering the "ladies dress and sportswear industry". The Schedule sets out certain minimum wage rates, (almost all of which are now of no effect due to the higher minimum rates prescribed under the *Employment Standards Act*), and also sets the regular work week at thirty-five hours per week. There is an "advisory committee" which oversees the operation of the schedule. Harwill Originals makes filings to the advisory on behalf of its sportswear operations. There is no schedule under the *Industrial Standards Act* covering knitwear. Because of the sportswear schedule, the respondents' sportswear employees work a regular work week of thirty-five hours, whereas the knitwear employees have a regular work week of forty hours.

11. Mr. Rosengarten is in charge both of the sportswear and knitting operations. Under

Mr. Rosengarten is an assistant who Mr. Rosengarten described as "The overlooker of everything". There is also a knitwear foreman and a sportswear foreman. Although, the foremen can hire most production employees, Mr. Rosengarten is involved in the hiring of designers, mechanics and cutters. All employees in knitwear are hourly paid, but in sportswear some are hourly paid while others are on piece work. Employees deal with the sportswear foreman about piece rates, but all final decisions concerning the rates are made by Mr. Rosengarten.

12. The applicant called Mr. William Villano, its Toronto Business Manager, to testify as to the applicant's practice in negotiating collective agreements. According to Mr. Villano, the applicant has a collective agreement with an association representing seventeen manufacturers of cloaks and suits, as well as an agreement with the Toronto Dress and Sportswear Manufacturers' Guild Inc. which has as members thirty-five firms in the dress and sportswear fields. It is of interest to note that this latter document indicates that prior to 1980 separate agreements were negotiated for ladies dresses and for sportswear. According to Mr. Villano, the applicant negotiates individual agreements with a number of knitwear firms. Mr. Villano testified that the applicant does not have any collective agreements covering both knitting and sportswear operations, and he went on to add that he is not aware of any Toronto firms which make both knitwear and sportswear. Mr. Villano conceded, however, that two other unions also organize employees in the garment industry and that he does not know what their experience has been in this regard.

13. There can be no doubt that Harwill Originals Limited and Rosengarten Freedman Knitting Co. Ltd. are being carried on under common direction and control. The firms have identical directors and officers, and Harwill Originals Limited is owned by Rosengarten, Freedman Knitting Co. Ltd. Further, in that the two firms are both engaged in the manufacture of clothing, serve the same general market and are being carried on for the benefit of the same principals, we are satisfied that they are engaged in "associated or related activities or businesses". In these circumstances, we are of the view that the statutory pre-conditions for the application of section 1(4) have been met. There still remains, however, the question as to whether the Board should exercise its discretion under section 1(4) to treat the two corporations as a single employer for the purposes of the Act. In this case, we believe that the issue turns primarily on whether the bargaining unit should be described only in terms of employees engaged in the manufacture of sportswear on the fifth floor, or whether it would more appropriately be described to also include knitwear employees working on the seventh floor.

14. As already indicated, the applicant seeks to restrict the bargaining unit to the sportswear employees. Indeed, it appears that it has only tried to organize the sportswear employees. It is the applicant's contention that the respondent is seeking to include the knitwear employees in the bargaining unit as a device to "flood" the bargaining unit and thereby defeat the application. The Board recognizes that frequently both unions and employers take positions relating to the description of a bargaining unit based upon their perception of the union's chances of being certified for the final unit. The Board also recognizes that in shaping bargaining units it must be sensitive to the real difficulties which trade unions face in organizing employees. This is particularly true where large numbers of employees are involved, the employees are spread out geographically or the industry involved is one that has traditionally been unorganized. In the instant case the knitwear and the sportswear operations between them employ about 43 bargaining unit employees. All of these



employees work in the same building, and the industry is one in which trade unions have been active for many years. Given these facts we do not believe that concerns about difficulties in organizing should be an overriding factor in determining the bargaining unit. Rather, we believe that concerns about viable bargaining structures and the fragmentation of employees should also be taken into account. Although two corporate entities are involved here, in reality the knitwear and sportswear operations are carried on as if they were separate divisions of the same firm. They are in the same building, under the direction of the same management and use the same "Golden Crown" name in dealing with the public. There is also a significant amount of movement of employees between the two operations. Given these facts, it is our opinion that to treat the two corporations separately for collective bargaining purposes would result in an undue fragmentation of the work force and also create the real potential of different trade unions becoming the bargaining agents for separate segments of what is essentially an integrated business. Accordingly, in our view, it would be appropriate to treat the two corporations as a single employer for the purposes of the Act and to group their employees together in a single bargaining unit.

15. In reaching this conclusion we have considered the fact that the sportswear but not the knitwear employees are covered by a schedule under the *Industrial Standards Act*. We do not regard this as a determining factor in these proceedings. Most of the wage rates set out in the schedule are no longer of any effect due to the higher minimums provided for in the *Employment Standards Act*, and in any event Mr. Villano's testimony indicated that wage rates negotiated by the applicant are well above the minimum set out in the schedule. The schedule does provide for a 35 hour regular work week for sportswear, whereas no such legal requirement exists for knitwear. In our view, however, this is a matter that could be accommodated without undue difficulty in collective bargaining. We also believe that collective bargaining can accommodate having sportswear and knitwear employees in the same bargaining unit, notwithstanding the fact that the respondent currently has no agreements with firms that make both knitwear and sportswear.

16. Having regard to the above, the Board declares Harwill Originals Limited, carrying on business under the registered name and style of Golden Crown Sportswear and Rosengarten, Freedman Knitting Co. Ltd., carrying on business under the registered name and style of Golden Crown Knitting Co. to be one employer for the purposes of the *Labour Relations Act*. The Board also finds that all employees of Harwill Originals Limited carrying on business under the registered name and style of Golden Crown Sportswear and all employees of Rosengarten, Freedman Knitting Co. Ltd. carrying on business under the registered name and style of Golden Crown Knitting Company in the municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, mechanics, designers, shippers and receivers, office and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 30, 1981, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. This application is accordingly dismissed.

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**2629-81-M** International Association of Bridge, Structural and Ornamental iron Workers, Local Unions 721, 736, 759, 765 and 786, Local Unions, v. **International Association of Bridge, Structural and Ornamental Iron Workers**, International Association, v. Iron Workers District Council of Ontario, District Council

Reference – International union not playing active role in negotiations – Failing to execute various provincial agreements – Whether should be removed from designated employee bargaining agencies

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and O. Hodges.

*APPEARANCES:* Maurice A. Green, David Bloom and Alan MacIsaac for the Local Unions; A. M. Minsky, J. H. Lyons, N. W. Wilson and J. Phair for the International Association; J. Harrower for International Association of Bridge, Structural and Ornamental Iron Workers Local 700.

**DECISION OF VICE-CHAIRMAN IAN SPRINGATE AND BOARD MEMBER J. WILSON; June 23, 1982**

1. This is a reference from the Minister pursuant to section 139 of the *Labour Relations Act*. The reference deals with the issue of whether the International Association of Bridge, Structural and Ornamental Iron Workers (The "International Association") should be removed from certain designated employee bargaining agencies.

2. When the *Labour Relations Act* was amended in 1978 to provide for a legislated system of provincial bargaining in the industrial, commercial and institutional sector of the construction industry ("the ICI sector"), the Minister of Labour was given authority to designate "employee bargaining agencies" to represent in bargaining "affiliated bargaining agents". The term "affiliated bargaining agent" is defined fully in section 137(1) of the Act, but for the purpose of these proceedings one can describe the affiliated bargaining agents of any employee bargaining agency as being the relevant International Union as well as all of its locals and district councils active in the ICI sector in the Province of Ontario. The Minister issued a total of some twenty-five employee bargaining agency designations. It appears that in every case where an international had a number of locals active in the ICI sector in the Province, the Minister jointly designated as the employee bargaining agency both the International union as well as a council comprised of its Ontario Locals. The Minister followed this approach even in those cases where such a council of local unions had to be expressly formed for the purpose. It should be stressed that the only role which the Act envisages for a designated employee bargaining agency is the negotiation of provincial agreements. This point is made clear by section 142 of the Act, which provides that the rights, duties and obligations of affiliated bargaining agencies vest in the employee bargaining agency "but only for the purpose of conducting bargaining and, subject to any ratification procedures of the employee bargaining agency, concluding a provincial agreement".

3. The International Association does not directly hold bargaining rights for any employees in the ICI sector in the Province of Ontario. Six subordinate locals of the International, however, Locals 700, 721, 736, 759, 765 and 786 do hold bargaining rights for

ironworkers and reinforcing rodmen in the ICI sector. These six locals comprise the Ironworkers District Council of Ontario ("the District Council"). Although this point was not definitely settled at the hearing, it appears that prior to provincial bargaining each local bargained on a local basis with respect to the reinforcing rodmen. With respect to the ironworkers, however, all of the locals, with the exception of Local 759 which is based in Thunder Bay, bargained collectively with a single employer's association, namely, the Ontario Erectors Association.

4. Prior to 1978, the International Association did play at least a limited role in coordinating the affairs of its Ontario Locals. Mr. George Allen, an Ontario based representative of the International Association, was the president of the District Council. In 1971, an agreement was negotiated with the Ontario Erectors Association which was executed on behalf of the other four locals which bargained together, but which Local 786 in Sudbury refused to sign. The International Association resolved the impasse by authorizing one of its local officers to execute the agreement on behalf of Local 786. The details of this situation are set forth in the *Sentinel Reliance Products Limited* case, [1973] OLRB Rep. Jan. 7.

5. The Minister issued the designation for rodmen and the designation for ironworkers on April 12, 1978. In both instances the Minister, in accordance with her standard procedure referred to above, jointly designated the International Association and the District Council as the employee bargaining agency.

6. The negotiations for the 1978-1980 and 1980-1982 Rodmen and Ironworkers provincial agreements were carried out by the Provincial Council. In accord with the scheme of the Act, there was no need for each local to execute the provincial agreements. Rather, the agreements should have been executed by the employee bargaining agency, that is, on behalf of the Provincial Council and the International Association. Both the 1978-1980 and 1980-1982 rodmen's provincial agreements indicate that they executed on behalf of the "Rodmen Employee Bargaining Agency". However, the title pages of both agreements wrongly identified the rodmen employee bargaining agency as the District Council and the six locals. The 1978-1980 Ironworkers' provincial agreement was signed on behalf of the District Council and the locals. The 1980-1982 provincial agreement was signed by representatives of the six locals on behalf of the District Council.

7. At the hearing, counsel for the International Association acknowledged that the International had not executed the various provincial agreements even though it formed part of both of the designated employee bargaining agencies. Counsel also acknowledged that when the provincial agreements were sent to the International Association for approval, as required by the International Constitution, inappropriate form letters were sent out in reply. These replies did not take into account either the provincial bargaining provisions of the Act or the Minister's designations. Rather, they utilized language aimed at protecting the International Association from liability arising out of any possible future breaches of the agreements. An example of the type of letters sent is the following which was sent to the District Council from the International Association with respect to the 1978-1980 Ironworkers' provincial agreement:



Mr. George Allen, President  
 District Council of Ontario  
 Suite 216 — Union Building  
 212 King Street West  
 Toronto, Ontario, Canada  
 M5H 1K5

Dear Sir and Brother:

The General Executive Board of this International Association has examined the Agreement which Local Union Nos. 700, Windsor, Ontario, 721, Toronto, Ontario, 736, Hamilton, Ontario, 759, Thunder Bay, N. Ontario, 765, Ottawa, Ontario and 786, Sudbury, Ontario entered into with The Ontario Erectors Association dated June 26, 1978 which you submitted to this International Association for approval pursuant to Section 29 of Article XXI of the International Constitution.

The International Association hereby approves the said Agreement generally as to form, as of its effective date. However, it is noted that certain specific sections conflict with the provisions of the General Working Rules which are subject to review by the General Executive Board from time to time. It is further noted that this is a District Council Agreement and should be signed by the President of the District Council and said approval is applicable to this particular contract only.

It is understood that said approval is merely as to form and *such approval does not make this International Association a party to the Agreement* or subject to any liability of any kind growing out of the provisions or operation of said Agreement.

Any provision in your Agreement with regard to maintenance, repair, replacement or renovation work shall have no binding force or validity. Such provisions, to be valid, must be in the standard form of National Maintenance Agreement and signed by a contractor for a specific project.

It must be expressly understood that any negotiated sections contained in said Agreement which are found to be contrary to the General Working Rules or policies of this International Association will be subject to immediate revocation by the General Executive Board.

Fraternally yours,

GENERAL EXECUTIVE BOARD

"Juel D. Drake"

General Secretary

(emphasis added)

8. It was the contention of counsel for the International Association that at the time the International Association had sent out these letters it had not understood the implications of being designated as part of the employee bargaining agencies, and did not appreciate that it should sign the provincial agreements. Counsel also stated that he had been advised by Mr. J. Lyons, the General President of the International Association, who was in attendance at the hearing, that the International was now aware of the provisions of the Ontario Act and was prepared to play a more active role in the negotiation process, including signing provincial agreements as part of the employee bargaining agency.

9. The position being taken by the Locals, other than Local 700, is that the International Association should be removed from the designations and that henceforth the District Council and the locals should constitute each of the two employee bargaining agencies. In support of this position counsel for the Locals contended that the intent of the original designations had been to “mirror” the existing situation and not to create or take away any bargaining rights. Accordingly, submitted counsel, in that the International Association had never been a party to the earlier agreements, the Minister must have made a mistake in designating the International as part of the employee bargaining agencies. Counsel also relied on the fact that when the International Association had approved the various Provincial agreements it had done so with the express statement that it was not a party to the agreements. Counsel added that, in his view, there would not be any detriment in dropping the International Association from the designations in that under the union’s constitution the International must give final approval to any collective agreement. Counsel for the International Association strongly opposed having the International removed from the designations. According to counsel, the International could lend “maturity” to the bargaining process in that it was above local rivalries and interests. Counsel also contended that the Locals were not concerned with the fact that the International Association had played a passive role in provincial bargaining in the past, but were concerned that it might now start to play a more active role.

10. A review of the various employee bargaining agency designations leads us to the conclusion that when they were made, the Minister was not necessarily attempting to “mirror” existing bargaining patterns. Indeed, in some instances, such as with the Carpenters, the effect of the employer and employee designations was to replace a myriad of local bargaining situations with a single province-wide bargaining relationship. As already noted, what the Minister did do was to adopt the general practice of designating as employee bargaining agencies both the relevant International Union and a Provincial Council of its locals. Presumably, since the Rodmen and Ironworkers’ designations both followed this pattern, the Minister did not make a “mistake” in the designation as contended by counsel for the locals, but rather the Minister felt the same considerations applied to them as with respect to the other trades.

11. What then were the considerations likely taken into account by the Minister? The advent of provincial bargaining required in some cases that locals which had never bargained together now be bound by a single agreement. In other cases, such as with the Ironworkers, although locals had previously bargained together, the locals no longer retained any right to decline to accept the resulting agreement or to decide to henceforth bargain their own agreements. In these circumstances, it is likely that the International unions were named as part of the designations due to a belief on the part of the Minister that local officials of an International, who because of their positions would have a good overview of the process,

could play a key role in ensuring that while the differing interests and concerns of the various locals were taken into account in provincial bargaining, they would not be allowed to stand in the way of formulating a single province-wide bargaining programme and strategy. Presumably, the Minister also felt that local officials of the Internationals could best play this role if the Internationals were an integral part of the employee bargaining agencies instead of leaving to them only the option of using the authority of the Internationals over the locals as set out in the International constitutions.

12. Although the International Association through its local officials has apparently not heretofore played the type of role referred to above, nevertheless, it has indicated that it is now prepared to do so. We regard the role as an important one which, if carried out in a constructive and sensitive manner, can be of real benefit to both the union's members and to the whole process of provincial bargaining. In these circumstances, we are of the opinion that at least at this time it would be appropriate to leave the International Association as part of the employee bargaining agencies. Should it be the case that in the future the locals feel that the International has misused its position as part of the employee bargaining agencies, or should it continue to refuse to execute provincial agreements (and thereby continue to place the legal basis of the agreements in jeopardy), then the locals could either seek relief under section 151(1) of the Act, which prohibits a designated employee bargaining agency from acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of affiliated bargaining agents, or again seek to have the designations reconsidered.

13. The question actually put to the Board by the Minister was as follows:

Briefly stated, the question is whether or not the purpose and intent of the province-wide bargaining provisions of the Act would be achieved through the removal of the International Association from the Structural Ironworkers and Rodmen designations.

Having regard to our reasoning set out above, in our view, the purpose and intent of the province-wide bargaining provisions of the Act would not likely be better achieved through the removal of the International Association from the designations. Accordingly, our answer is "No."

#### **DECISION OF BOARD MEMBER O. HODGES;**

1. I dissent.

2. In March 1978, the Minister of Labour designated the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario as the employee bargaining agency to represent Locals 700, 721, 736, 759, 765 and 786.

3. In effect, the Ironworkers District Council and the Locals have carried out the bargaining. The International has not heretofore desired to be bound by the agreements. In his letter of September 15, 1978 to the District Council, Mr. Drake, General Secretary of the International, expressly states that his body's approval of the District Council Agreement "does not make this International Association a party to the agreement".

4. In the collective agreements between the Ontario Erectors Association and the



Ironworkers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786 dated May 1, 1978 to April 30, 1980 and May 1, 1980 to April 30, 1982, the Preamble states:

“AND WHEREAS the Iron Workers District Council of Ontario is the designated employee bargaining agency for such iron worker employees with respect to such sector;”

5. The agreements between the Rodmen Employer Bargaining Agency and the Union covering the same period, mention both the International and the District Council as constituting the “Employee Bargaining Agency”.

6. The Board’s practice in applications such as the one before us should be to give great weight to the bargaining practice already established. The existing bargaining rights should be preserved and given recognition. It is clear from the evidence that prior to this application the International specifically severed itself from the employee bargaining agency and abandoned its rights therein. Furthermore, it indicated that it was content to leave the District Council in the position of exclusive bargaining agency. This understanding is given voice in the agreements with the Ontario Erectors Association. In view of the foregoing, I would, in accordance with the labour relations practice in the industry, recommend removal of the name of the International from the designation of the bargaining agency for all the locals, with the sole exception of Local 700, which wishes to use the International as its agency.

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**1712-81-R** Retail Commercial and Industrial Union Local 206  
Chartered by the United Food and Commercial Workers International  
Union C.L.C.-A.F.L.-C.I.O., Applicant, v. **John Lester Drugs Ltd.**,  
Respondent

**Charges – Sale of a Business – Unfair Labour Practice – Whether franchise arrangement “a business” – Union obtaining certification and collective agreement in short period of time – Negotiations lasting only five hours – Vendor signing generous three year agreement three weeks prior to handing over business – Successor not informed of negotiations or signing – Whether employer support nullifying collective agreement – Board not having general discretion to declare collective agreement not binding**

**BEFORE:** G. Gail Brent, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** Raj Anand and Charles McCormick for the applicant; A. D. G. Purdy, R. A. Pepper and John Lester for the respondent.*

**DECISION OF G. GAIL BRENT, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; June 14, 1982**

I

1. The applicant has applied to the Board pursuant to section 63 of the Act for a declaration that there was the sale of a business within the meaning of the Act, which results in the respondent being bound by a collective agreement between the applicant and S. B. Sitka Drugs Ltd. (hereinafter referred to as “Sitka”).

2. The respondent made allegations concerning employer involvement and/or assistance in the formation of the applicant trade union at the Sitka store. The Board heard the evidence concerning the allegations and will deal with the issues in the course of this decision.

II

3. On or about October 15, 1976, Sitka entered into a three-year agreement with a subsidiary of Koffler Stores Limited (hereinafter referred to as “Koffler”) to operate a Shoppers Drug Mart franchise at the Georgian Mall in Vespra Township just outside the city limits of Barrie, Ontario. Koffler is the owner of the Shoppers Drug Mart trademark, and licenses pharmacists, or corporations incorporated by pharmacists, to operate under the Shoppers Drug Mart trademark, known as “associate stores”. Koffler finds a site which it considers to be a good location for a drugstore, leases the store, secures all of the fixed assets and generally prepares the store so that the pharmacist it licenses to use its trademark can virtually walk in and begin to operate. The Sitka agreement with Koffler expired in 1979 and was subsequently renewed for two years.

4. Before dealing with the particulars of the agreement and the circumstances which arose in 1981, it may be useful to outline briefly some of the general information concerning the operation of a Shoppers Drug Mart Store. Without going into considerable detail, it

appears that Koffler runs regular semi-annual buying shows which are attended by representatives from the associate stores, and at which orders for merchandise can be placed by the representatives of the individual associate stores. Koffler also acts as a resource for the individual pharmacists, or their operating companies, in determining minimum suggested wage rates for employees and in making available benefit packages which the pharmacists can make available to their employees. All employees in any store are employed by the pharmacist or the pharmacist's corporation, as the case may be. The wages, benefits, and all other terms and conditions of employment are set by the operator of the individual associate store, and there is no formal compulsion other than peer pressure to have standard wages, benefits, etc. At the time that an associate agreement is terminated, Koffler directs the licensee to end the employment relationship with his employees by giving them the required notice and paying them all wages, vacation pay, and any other money due to them.

5. The associate agreement is a rather long and detailed commercial agreement. As mentioned earlier, it concerned a store leased by Koffler and described in Schedule "A" as being located at:

Georgian Mall  
Hwys 26 & 27, Vespra Twp.  
Barrie, Ontario.

The terms of the agreement make it clear (Article 17) that the agreement could not be assigned by Sitka but could be assigned by Koffler. The basic framework of the arrangement required Sitka to operate the drugstore at the location according to Koffler's standards, and to pay certain amounts to Koffler. Sitka was obliged to notify all of his suppliers that he was an independent contractor and that Koffler would not be liable for any debts incurred by Sitka (Article 6), and the agreement recognized that all money derived from the operation of the business belonged to Sitka (Article 7). Under the terms of Article 13, upon termination of the agreement, Sitka was obliged to convey to Koffler, or its designate, all prescriptions lists, customer information, inventories, and goodwill, including the rights to use the telephone number established for the particular store. The article also provides that no formal conveyance is needed to effect the transfer to Koffler or its designate.

6. On or about August 10, 1981, Koffler formally notified Sitka by letter that the associate agreement would not be renewed and that it would terminate effective October 14, 1981. Without going into the circumstances surrounding Koffler's decision to terminate the Sitka agreement in depth, it is sufficient to state that Koffler was not satisfied with Sitka's performance, and that it considered that Mr. Sitka was not being forthcoming when Koffler tried to approach him about its concerns. One of the concerns appears to have been that Koffler had good reason to believe that Mr. Sitka was either involved in, or about to become involved in, a new competing drug store in a Barrie medical centre. In the course of time Koffler designated the respondent as the transferee pursuant to Article 13 of the agreement. At Koffler's request Sitka executed the following conveyance in favour of the respondent:

THE INDENTURE made in duplicate this 15th day of September, 1981.



BETWEEN:

S. B. SITKA DRUGS LIMITED  
hereinafter called the "Vendor"

OF THE FIRST PART;

-AND-

JOHN LESTER DRUGS LTD.  
hereinafter called the "Company"

OF THE SECOND PART;

WHEREAS the Vendor owns and *operates a retail drug store business* at Georgian Mall, Bayfield Street North, Barrie, Ontario, (hereinafter called the "Business");

AND WHEREAS the Vendor has agreed to sell, transfer, convey, assign and deliver to the Company all of the right, title and interest of the Vendor to and in the assets, goodwill, properties and rights *of the Business* owned by the Vendor (hereinafter collectively called the "Business Assets") and the *Business as a going concern* as at the close of business on the 14th day of October, 1981.

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the sum of TWO DOLLARS (\$2.00) of lawful money of Canada and other good and valuable consideration, the receipt whereof by the Vendor is acknowledged, the parties hereto covenant and agree as follows:

1. The Vendor does hereby grant, bargain, sell, assign, transfer, convey, deliver and set over unto the Company, its successors and assigns, all of the Vendor's right, title and interest to and in the Business Assets and the *Business as a going concern* with effect as at the close of business of the Vendor on the 14th day of October, 1981, including and without limiting the generality of the foregoing:

- (a) all cash on hand and in the bank;
- (b) all merchandise inventory, stock-in-trade and supplies of the Business;
- (c) all accounts receivable of the Business;
- (d) all prepaid expenses and deposits of the Business;
- (e) any and all other assets useful in the Business, but excluding any shares in Drug Trading Company Limited and any vehicle owned by the Vendor.

TO HAVE AND TO HOLD the Business Assets unto and to the use of the Company, its successors and assigns forever.

2. The Vendor does covenant, promise and agree with the Company that the Vendor is now rightfully and absolutely possessed of the Business Assets granted, bargained, sold, assigned, transferred, conveyed, delivered and set over by the Vendor hereunder and that the Vendor now has good right to assign all of its right, title and interest in the same unto the Company, its successors and assigns, according to the true intent and meaning of these presents and the Company shall immediately upon the execution and delivery of these presents have possession of and may from time to time and at all times hereafter have, hold, possess and enjoy the Business Assets and every part thereof to and for the use and benefit of the Company without any manner of hindrance, interruption, molestation, claim or demand whatsoever, from or by the Vendor.

3. The Vendor covenants and agrees with the Company, its successors and assigns, that the Vendor will from time to time and at all times hereafter, upon every reasonable request of the Company, its successors and assigns, and at the expense of the Company, make, do and execute or cause to be produced, to be made, done and executed all such further acts, deeds or assurances as may be reasonably required by the Company, its successors or assigns, whether for more effectually and completely vesting in the Company, its successors or assigns, the Business Assets and *the Business* or for the purpose of registration or otherwise.

4. The Vendor hereby declares that as to any Business Assets or the Business, or interest in any Business Assets or the Business, the title to which may have passed to the Company by virtue of this Indenture or any transfers or conveyances or other documents which may from time to time be executed and delivered in pursuance of the covenants aforesaid, the Vendor holds the same in trust for the Company to convey, assign and transfer the same as the Company may from time to time direct.

5. The Vendor and Company hereby waive compliance with the provisions of the Bulk Sales Act of the Province in which the Business Assets are situate and the Vendor agrees to indemnify and save harmless the Company from and against any and all liabilities, costs and demands which may be claimed against the Company as purchaser of the Business Assets for failure to comply as aforesaid.

IN WITNESS WHEREOF this Indenture has been executed by the Vendor as of the day and year first above written.

SIGNED, SEALED &	)	S. B. SITKA DRUGS LIMITED
DELIVERED	)	
in the presence of	)	Per _____

"Paul Wessenger"	)	President
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[emphasis added]

Mr. Goldberg, the Executive Vice-President of Legal Affairs and Corporate Secretary of Koffler, testified that he prepared the document and that it is a standard form used to ensure that there would be an orderly transfer of the business so that there would be no interruption in the Georgian Mall operation. He said that he regarded it as a formality to satisfy the requirements of the *Bulk Sales Act*.

7. The respondent executed an associate agreement with Koffler which was effective October 15, 1981, and from that date on the respondent began to operate the Shoppers Drug Mart Store in the Georgian Mall. There was no interruption in the operation of the drugstore.

8. The above narrative has been relatively straightforward. From this point on, the recitation of the facts becomes more complex. For reasons which it is hoped will become apparent later, we will now progress to the involvement of Mr. Randall Linn in the matter before us.

### III

9. Mr. Linn, who is 38 years old, was first employed by Sitka in September, 1979. During the entire period in question he was employed as Sitka's Merchandise Manager. Prior to that he had been employed at a shoppers Drug Mart store in Newmarket. According to all of the evidence, the only person in the Sitka store who could hire, fire, set wages and establish benefits was Mr. Sitka. Mr. Linn's duties involved scheduling the stock boys and being generally "in charge" of the front of the store. It would appear that he had some authority to post notices and give instructions which he would expect to be followed. As part of his job, he would purchase merchandise on a regular basis and had accompanied Mr. Sitka to two of the Shoppers associates' buying shows in the past.

10. The head cashier scheduled the hours for the cashiers at the front of the store. Other employees in the store had their hours set by Mr. Sitka. It appears that the employees in the areas other than the dispensary clearly regarded Mr. Sitka as the boss, but would go to Mr. Linn to get permission to leave early, or to have minor problems resolved if Mr. Sitka was not in the store.

11. Sometime in June or July, 1981, at least some of the employees in the Sitka store began to hear rumours that Mr. Sitka would be leaving the store and moving to another location in Barrie. After hearing the rumours, Ms. Jacqueline Cooley, the head cashier, talked to Mr. Sitka and asked him about the possibility of a job at his new store. He told her that her position was more secure with Shoppers and that she would have better wages and chances for advancement by staying with Shoppers than she could have in his new store. In August her salary was raised by Mr. Sitka and she was told by him that she was getting the raise to ensure that she would have it when the new person took over. Mr. Sitka said that the raise was given to her once she had been confirmed as satisfactory in the head cashier position.

12. Mr. Sitka did become involved in a new drugstore within the city limits of Barrie which opened on or about November 16, 1981. He said that he is an employee of the operator, Family Prescriptions (Windsor) Ltd. Some of the former employees at his Shoppers Drug Store are now employed with his new pharmacy.

13. It is clear that sometime in August 1981 Mr. Linn became aware of the possibility



that the Sitka employees might lose their jobs when Mr. Sitka left the store. There was no evidence about the source of this information; however, it is clear that a number of employees had been discussing the turnover of the business, and it is not surprising that Mr. Linn would reach this conclusion or become aware of the Koffler practice of having the associate terminate the employment of all of its employees at the conclusion of the associate agreement. The evidence of Mr. Goldberg was that the instructions and direction to terminate the employment of the employees were not sent to Sitka's solicitor until September 21st. The letter giving notice of the termination of Sitka's agreement had been sent on August 10th, but it did not mention anything about the employees.

14. Around August 25th Mr. Linn arranged to meet with Mr. David Vandivier, a general organizer employed by the applicant, after work on August 26th at a motel in Barrie. At that meeting Mr. Vandivier determined to his satisfaction that Mr. Linn was not management, and Mr. Linn related his concerns that the employees would have no job security beyond the date of the termination of the Sitka agreement with Koffler. They agreed that organizing the employees was the answer to the problem, and Mr. Linn joined the applicant that night. The next night Mr. Linn had another meeting with Mr. Vandivier at the same hotel. Mr. Linn brought another employee with him, and he and Mr. Vandivier convinced her that organizing the employees was the correct course to follow. From that point on Mr. Vandivier handled the details of the application for certification. He filed the application for certification on August 28th, before meeting with any of the other employees, because he was sure that he could get enough support from the employees.

15. A meeting of employees was held on September 1, 1981, in a Barrie motel. At that time Mr. Sitka was away in Toronto at a Shoppers buying show. Mr. Linn was supposed to have attended the show with him but had told Mr. Sitka that he felt he would be better used in the store and had personal matters to attend to. Mr. Linn said that he did not discuss the formation of the union with Mr. Sitka. Mr. Linn approached the employees in the store and asked each of them separately to attend the meeting at the motel on September 1st. He did not tell any of them the reason why the meeting was being held.

16. When the employees arrived at the meeting, Mr. Vandivier was introduced to them, and their job security was the main issue discussed. There was also some discussion about the benefits which joining a union could bring to them. It is evident from the evidence of the employees who testified that there was a real concern about what would happen to them when Sitka ceased operating the Shoppers Drug Mart in the Georgian Mall. At the conclusion of the meeting, cards were signed, dollars were paid, and Mr. Vandivier had the membership evidence he needed for the certification application.

17. Meanwhile Mr. Sitka was at the buying show and had some meetings there with Mr. Lester, who is the pharmacist connected with the respondent. The respondent had been offered the Sitka store in July, and Mr. Lester knew then that he would be moving to Barrie. At that time the respondent was operating a Shoppers Drug Mart in Orillia. Mr. Lester and Mr. Sitka did not discuss the takeover, but they did look over some orders for the store to see if they were correct.

18. On Friday, September 4th, Mr. Sitka received the usual notice from the Board that an application for certification had been filed by the applicant. Mr. Sitka said that two of the employees were in the office then and they all discussed the application. He said that it was an

emotional time and he told them not to worry but to leave it with him. He then tried to get in touch with his solicitor, Mr. Wessenger, but could not reach him then and, because it was the afternoon of the Friday before Labour Day, was unable to reach Mr. Wessenger until the following Tuesday. Mr. Sitka said that on Tuesday morning, before he spoke to his solicitor he received a telephone call from Mr. Bloom, an officer of Koffler and one of the people identified by Mr. Goldberg as being likely to be involved in discussions with an associate concerning policies and suggestions for any collective agreement. Mr. Sitka said that Mr. Bloom knew about the application for certification and asked why Mr. Sitka had not informed him of it. Mr. Sitka said that he told Mr. Bloom that he had just received the application on Friday afternoon and had not had an opportunity to see his solicitor yet, and that Mr. Bloom said: "Hold still. We'll be in touch". Mr. Goldberg also testified that Mr. Bloom had informed him of the application.

19. That same day Mr. Sitka saw his solicitor and a letter was sent to Koffler informing it of the certification application. The bargaining unit was described as an all-employee unit except for the pharmacist, and that information was made known to Koffler. Mr. Sitka said that his solicitor looked over the application and discussed it. He also said that he asked his solicitor whether it would be proper to talk to his staff individually and was told he could, so long as he passed no judgement on their action and made no threats.

20. Mr. Sitka testified that he did talk to each employee after that and learned that they were concerned about their jobs and apprehensive about the future. He said that he was sympathetic and reassured them that he would "work on their behalf" and while he was at the store, would "do everything possible to see them through this thing". He testified that he wanted to get Mr. Lester to come and talk to the employees and to get reassurances from Mr. Lester about the staff.

21. The terminal date for the certification application was September 10th. On September 8th or 9th Mr. Goldberg telephoned Mr. Sitka's solicitor to discuss the application. The description of the bargaining unit was read to Mr. Goldberg and he was told that a reply would be filed indicating that Sitka was going out of business. Mr. Goldberg said that Mr. Wessenger also indicated that he did not believe that he would be receiving instructions to attend at the Board. The hearing date was to be on September 18th. It should be noted that the application for certification referred to the bargaining unit as being located in Barrie and to Sitka as being located in Barrie, rather than Vespra Township. When the reply was filed, no correction was noted.

22. On September 10th Koffler informed the respondent that there was some sort of union activity at the Sitka store. Mr. Lester was advised by Koffler to retain counsel and was introduced to his present counsel at the Koffler central office. He was also informed that there would be a certification hearing on September 18th.

23. Between September 1st and October 8th the respondent determined to begin staffing the Georgian Mall store. Mr. Lester had already decided to take his merchandising manager, Mr. Rowe, with him from Orillia, and wanted to begin by hiring the other key people — head cashier, bookkeeper, and head cosmetician.

24. There was no certification hearing because the parties to the proceedings both executed a waiver. On September 16th the Board sent telegrams to the parties informing them

of the waiver. In due course a certificate was issued for the bargaining unit as described in the application. The certificate was mailed to Sitka's solicitor on or about September 23rd.

25. Around the middle of September Mr. Sitka received another telephone call from Mr. Bloom telling him to terminate the employment of his staff effective the date of the expiry of the associate agreement. Mr. Sitka said that he asked Mr. Bloom why he had received no additional help in handling the situation at the store and tried to press Mr. Bloom into giving him some sort of guidance. He said that Mr. Bloom said nothing other than to terminate the employment of the staff and to say that the forms would be forwarded to his solicitor. Those forms were forwarded on September 21st. Mr. Sitka said that he consulted with his solicitor and was advised not to terminate the employment of anyone because there would then be no guarantee of employment with the respondent. He said he acted on his solicitor's advice. No employee received any notice of termination of employment from Sitka. It appears that Sitka did not inform Koffler that its instructions were not being complied with. It would seem reasonable for anyone familiar with the Koffler operation to assume that employees would be given such notice whenever an associate agreement expired.

26. Prior to the date that the certification application was received, Mr. Sitka telephoned Mr. Lester twice to ask him to come to the store and meet the staff. Mr. Lester refused. He said that he knew that Mr. Sitka was losing the franchise and going into competition and did not think that having a meeting with Mr. Sitka present would be a good idea.

27. Sometime after September 16th Mr. Charles McCormick, the President and Chief Executive Officer of Local 206, telephoned Mr. Wessinger, Sitka's solicitor, to arrange a meeting to negotiate a collective agreement. That meeting was set for September 23rd and took place on that date beginning around 2:00 p.m. Mr. McCormick was accompanied by Mr. Vandivier and brought with him proposals in the form of a three-year collective agreement modelled along the lines of the collective agreement between a large chain of drugstores and the applicant trade union (hereinafter referred to as the "Boots agreements"). Mr. McCormick testified that it was his practice to arrange negotiating meetings by telephone, but that he had also, on occasion, sent notice of desire to bargain by registered letter. There had been no meeting of employees since the organizing meeting at the beginning of September. Although Mr. Vandivier said that the employees' concerns were discussed then and formed the basis for the proposals, it seems clear from the evidence of the employees that no formal proposals for a collective agreement were discussed with them prior to September 23rd. There can be no doubt, though, that the employees' prime concern was to keep their jobs after October 15th.

28. On September 23rd, when the applicant met with Sitka to negotiate, both parties to the negotiations knew:

- (a) that Sitka would not be operating the store after October 14th;
- (b) that Mr. Sitka would be going into business in Barrie in competition with the Shoppers Drug Mart Stores; and
- (c) that the employees were concerned about their future employment prospects after October 14th.



In addition, Sitka knew:

- (a) that the respondent would be taking over the Georgian Mall store;
- (b) that the employees would not be given notice of termination of employment; and
- (c) that the respondent had heretofore refused to meet with the Sitka employees.

29. At the commencement of negotiations Mr. Sitka declared that he wanted a collective agreement which would be fair to the respondent, to the employees, and to Koffler. That statement should perhaps be considered in the context of the fact that he had not given notice to either the respondent or to Koffler that he had received notice to bargain and that the negotiations were taking place on September 23rd. Without going into the details of the negotiations, the parties reached agreement on everything sometime around 7:00 or 8:00 p.m. on September 23rd. In the course of examining the proposed collective agreement, Sitka's solicitor pointed out that the location of the store was in Vespra Township and not in Barrie. The collective agreement reflected the amendment, and the Board was notified of the error and eventually issued a revised certificate.

30. Both Mr. Sitka and the applicant's witnesses who were present at the negotiations testified that there was give-and-take, and that the collective agreement is the result of the changes negotiated to the applicant's original proposal. Mr. Sitka testified that he relied heavily on his solicitor during the course of negotiations and did not concern himself with the details of contract language. The collective agreement negotiated in five or so hours that night was one which took considerably longer to negotiate with Boots. There was no explanation given by Mr. Sitka concerning why he would enter into a three-year agreement with the applicant when he knew that he had only three weeks left in the store. Mr. Sitka executed the collective agreement at the end of negotiations that night. He did not notify Koffler or the respondent of his intention to execute the collective agreement, nor did he notify them that a collective agreement had been executed.

31. It appears from Mr. Lester's testimony that he did not begin to make any attempts to hire any of the Sitka employees until around September 25th and 26th. On these days he telephoned Sally Struthman, Dianne Sills, and Jackie Cooley and tried to arrange meetings with them. Ms. Struthman indicated that she would prefer to meet him after he took over the store. The other two agreed to meet with him. On September 28th Mr. Lester received a telephone call from Mr. Sitka advising him that he had met with the two women and they had decided not to meet with him. Mr. Sitka also said that the employees preferred to meet with Mr. Lester as a group and he would set up a meeting of employees at the store on October 6th. Mr. Lester refused this offer, and told Mr. Sitka that he preferred to interview individually and wanted to pick out his key people first. During that conversation Mr. Sitka made no mention of any negotiations or collective agreement.

32. Ms. Cooley said that she was told by Mr. Sitka that there would be no interviews with Mr. Lester until he took over the store and that she listened to him because he was still her employer.

33. On September 28th, the applicant held a meeting to ratify the collective agreement. The meeting was held at a motel in Barrie and the proposed collective agreement which had been executed by Mr. Sitka was presented to the employees. They voted to ratify the agreement. They also elected stewards — Ms. Cooley and Mr. Linn. It was generally known by then that Mr. Lester would be in Barrie on October 5th to interview staff, and it was probably at this meeting that the employees were advised by the applicant not to apply to Mr. Lester for their jobs.

34. The applicant executed the collective agreement on September 30th. Sitka was notified of this.

35. Meanwhile, on September 30th, Mr. Lester had contacted the Canada Manpower office in Barrie about recruiting employees. As a result of this, there were advertisements broadcast on the radio in Barrie, as well as newspaper advertisements. Sixteen people, none of whom had been Sitka employees, were interviewed by Mr. Lester on October 5th. Six were hired. Between October 6th and 8th the respondent caused all of the Sitka employees, except Mr. Linn, to be telephoned to come for an interview. On October 7th Mr. Lester first became aware that there might be a collective agreement between Sitka and the applicant as a result of a casual conversation he had with Mr. Struthman. On October 8th Mr. Lester held his interviews and hired those Sitka employees who attended. During the course of the interviews, he received a “two hundred and fifty word” telegram from the applicant informing him that he was in violation of the collective agreement and asking him to contact Mr. McCormick. Mr. Lester did not contact Mr. McCormick.

36. Between September 28th and October 8th Mr. Lester had also received some telephone calls from Mr. Sitka complaining about Mr. Lester bothering the employees. Mr. Sitka also advised employees not to be interviewed by Mr. Lester and not to apply for their former jobs. He went as far as telephoning Ms. Cooley at home to tell her not to “fly off the handle” and jeopardize everyone’s chances.

37. Mr. Sitka said that he gave that advice based on his solicitor’s advice and in response to the apprehension which the employees were expressing to him.

38. When Mr. Lester eventually arrived to take over the store, he was called into the back room by Mr. Sitka and introduced to the applicant’s business agent. He was informed again of the collective agreement and was promised a copy of it. All employees who were not hired by the respondent were informed that they did not have jobs, and grievances were filed on their behalf.

39. Mr. Lester testified that when he learned of the certification application he expected that he would have to negotiate a collective agreement. The respondent’s expectation was clearly that no negotiations would take place in the short period between the certification and the date Sitka’s associate agreement would come to an end.

40. There is no evidence to suggest that the applicant knew that Sitka had not notified the respondent or Koffler of the negotiations or the collective agreement. Mr. McCormick testified to the effect that he regarded Koffler as being a sort of hidden party at the table; however, it would be difficult for a reasonable person to maintain that view in the face of the realities of the negotiations with Sitka.

41. Several issues were raised during the course of the argument. The first which should be dealt with is whether there has been a sale of a business within section 63 of the Act.

42. Section 63(1)(b) defines “sells” as follows:

63.-(1) In this section,

(b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

That definition becomes important in the context of section 63(2) which is also set out below:

63.-(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

Assuming for the moment that Sitka was “an employer who is bound by or is a party to a collective agreement”, it is necessary to determine whether Sitka sold “his business” to the respondent.

43. The franchise arrangement with Koffler is set up in such a way that the associate is not able to assign any of his interest under the associate agreement to a third party. The agreement recognizes that there are some items such as prescription and customer information, stock in trade, and that portion of the goodwill that is personal to the associate which must be transferred from one associate to another in order to allow the store to operate without interruption when there is a change in the identity of the associate. It would appear that, except for the identity of the associate, there would be no major change noticeable in the Georgian Mall store after the respondent took over. The nature of the business remained unchanged. The sort of merchandise sold would not change. The skills required to perform the work would not change. The terms of the arrangement with Koffler and the manuals referred to in the associate’s agreement would also ensure that there was a considerable degree of uniformity among all of its associated stores.

44. In *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, the Board considered a situation where the Crown in right of Canada owned a parking lot at the Toronto International Airport, the operation of which it contracted out by way of public tender. The assets were all owned by the Crown and all of the money collected was paid to the Crown. The operator derived no revenue from the amounts collected in the lot; its revenue was fixed by its contract with the Crown and the Crown was its sole customer. At paragraph 6 of the decision the Board described the operator’s business in these terms:

... the supply of managerial and employee skills to the Federal Government and virtually every aspect of the business — including important



aspects of the employer-employee relationship — is regulated by the management contract or is subject to direct control by the Crown.

The Board then went on, at paragraph 30, to determine what a “business” was within the section with which we are concerned. It said:

A business is a combination of physical assets and human initiative. In a sense it is more than the sum of its parts. It is a *dynamic* activity, a “going concern”, something which is “carried on”. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a “business” from an idle collection of assets.

After that anthropomorphic analysis, the Board said, at paragraph 44:

For a transaction to be considered a “sale of a business” there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern”. A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfers *his* business. The use of the active verb and possessive pronoun is not insignificant.

45. The thrust of the analysis was that there was no business to be transferred between the two parking lot operators. The decision did not preclude a transfer taking place under compulsion by means of a corporate parent or some other controlling person or body (see paragraph 36). There was nothing transferred between the two entities there and, in particular, there was no earning asset which passed from one operator to the other. This case is different in that the business with which we are concerned is something beyond the mere provision of management skills to the owner of a revenue-producing asset. Here the associate, even though his term may be limited, is exploiting a revenue-producing enterprise for his own profit as well as for the profit of Koffler. The associate’s income is directly affected by the revenue derived from the store, and it is recognized that all of the money derived from the operation of the store is his subject to his obligations. Although the associate participates in the goodwill associated with the Koffler operation, there is also a certain amount of goodwill which is personal to him and which could be of benefit to someone succeeding him in the enterprise. Therefore, unlike the Metropolitan situation, it would have to be concluded that there was indeed a business to be transferred here.

46. The conveyance from Sitka to Lester clearly recognizes that there is a business to be conveyed and that Sitka has rights in the business which are being conveyed to Lester. The conveyance itself is determinative of the issue and the associate agreement also recognized that there was something which belonged to Sitka and which had to be transferred to the new associate in order to accomplish a turnover of the business. Therefore, even though it was not

necessary, strictly speaking, to have Sitka execute any conveyance, there was still a need to completely extinguish Sitka's interest in the business and convey that interest either directly (as through the conveyance detailed in paragraph 6 of this decision) or indirectly (as through Koffler) to the new associate, in order to allow the new associate to operate the business without interruption. This Board has considered that the word "sell" as defined in section 63(1)(b) of the Act should be interpreted widely, in a remedial way, and that the *ejusdem generis* rule ought not to apply to the phrase "any other manner of disposition" — see *United Steelworkers of America v. Thorco Manufacturing Limited* (1965) 65 CLLC ¶16,052. In the circumstances of this case the Board concludes that there was in fact a transfer or other disposition of Sitka's business to the respondent.

47. Two cases from British Columbia concerning franchises were cited as was one from Nova Scotia. In the latter case, *Balcom-Chittick Limited and G. Tamblin Limited*, (1977) 2 Can. L.R.B.R. 336, there was no issue concerning whether a sale had taken place. This case will be discussed more fully later. The two British Columbia cases, *Victoria Dodge Chrysler Ltd.*, (1980), 1 Can. L.R.B.R. 37 and *Interior Diesel and Equipment Ltd.*, (1980) 3 Can. L.R.B.R. 563, both dealt with the question of whether there was a sale within the meaning of section 53(1) of the *Labour Code R.S.B.C. 1979*, c. 212 as amended.

48. There has been a sale of a business in this case, therefore there is no need to discuss the British Columbia cases. The discussion in those cases would be relevant only if there had been no transfer of the business from Sitka to Lester.

49. In *Balcom-Chittick (supra)*, the Nova Scotia Labour Relations Board held, in a situation where a vendor signed a collective agreement between the date of the signing of a buy-sell agreement and the closing date, that the operative date for determining the successor's obligations was the date the transfer was agreed to rather than the closing date. Section 18(1) of the *Nova Scotia Trade Union Act* reads, in part, as follows:

If in any proceeding before the Board a question arises under this Act as to whether

• • •

- (j) an employer has sold, leased, transferred or agreed to sell, lease or transfer his business or the operations thereof or any part of either of them or has contracted out or agreed to contract out any part of the work done by his employees;

• • •

the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act.

Further, section 29(1) of that Acts sets out the following:

Where an employer sells, leases or transfers or agrees to sell,

lease or transfer his business or the operations thereof or any part of them and either

- (a) the employer or the purchaser, lessee or transferee or any of them is a party to or is bound by a collective agreement with a bargaining agent on behalf of any employees affected by the sale, lease or transfer or contract;

• • •

unless the Board otherwise directs, the collective agreement, certification, application, notice or entitlement to give notice continues in force and is binding upon the purchaser, lessee or transferee.

It can be seen that the Nova Scotia statute specifically refers to an agreement to sell or transfer, etc. a business as well as to an actual sale, transfer, etc.; therefore it is possible to conclude in a *Balcom-Chittick* type of situation that the transferee's obligations arise at the time of the agreement to sell and not at the time of the actual transfer. In Ontario neither section 63(1)(a) nor section 63(2) specifically refers to an agreement to sell, but rather to the actual sale, transfer, lease or other manner of disposition. It would seem, therefore, that in Ontario the time of the actual disposition is important for determining obligations under section 63(2), and not the time when an agreement or a direction to transfer has been made. Accordingly, *Balcom-Chittick* (supra) must be read in the context of the Nova Scotia legislation and cannot be read as generally entitling the transferee to relief when obligations have been incurred immediately before the transfer is effected.

50. The next matter to be considered is whether or not there was a collective agreement between Sitka and the applicant. The respondent has challenged the existence of such an agreement on the grounds of management support contrary to sections 13 and 48.

51. It was alleged that the applicant received management support in its organization campaign. There is no evidence from which to conclude that Mr. Sitka was aware of the organizing campaign before he left for the buying show at the end of August. The key to the respondent's argument is that Mr. Linn, who played the major role in organizing the employees, was at all material times an excluded person under section 1(3)(b) of the Act. There is no dispute between the parties concerning the necessity of keeping members of management out of the employees' bargaining unit and the reasons for doing this.

52. The Board heard evidence concerning Mr. Linn's duties and responsibilities as merchandise manager. It is evident that he possessed some responsibilities concerning the scheduling of some of the staff and that he had some limited authority to authorize employee absences and direct some of the employees. He had no authority to hire and fire and there is nothing to suggest that he could discipline employees. It is evident that, as natural in a fairly small retail establishment, Mr. Sitka made all of the decisions concerning hiring, firing and any disciplinary actions which had to be taken. In addition, Mr. Sitka made all of the decisions regarding the terms of employment and there is no evidence that Mr. Linn played any role in determining those matters at all. Despite his title, it is clear that Mr. Linn exercised only limited authority and cannot be regarded as exercising managerial functions within the meaning of section 1(3)(b). The evidence does not show that any employee joined the trade



union or supported it because he or she thought that Sitka wanted the applicant to be certified, or indeed that anyone thought Sitka knew of the application. Accordingly, there has been no violation of section 13 of the Act because there is no evidence to show that there was employer support to the applicant trade union in its organizing and nothing to show that the Board should not have certified the applicant.

53. Moreover, even if Mr. Linn was excluded under section 1(3)(b), which he is not, there is no evidence to show that the applicant perceived him to be a member of management or that the employees perceived him to be acting in the interest of management in organizing the employees. The Board has not applied a section 13 bar where a reasonable employee would regard the management person as acting against the interests of management — see, for example, *National Dry Company Ltd.*, [1980] OLRB Rep. Aug. 1217 and *Waldorf Astoria Hotel*, [1981] OLRB Rep. Sept. 1308.

54. Any statements Mr. Sitka made about wanting to do his best for his employees were made after the application had been filed and after the membership cards were signed. They could not have affected any employee's decision to join the applicant. There is no evidence to suggest that any employee was under the impression that Mr. Sitka supported the application for certification. The evidence indicates that the employees who testified were all concerned about their future once Sitka ceased operating the store and became convinced at the organizing meeting that joining the applicant was the best way of ensuring their future employment at the store.

55. The respondent has also argued that Mr. Sitka's conduct, taken as a whole, demonstrated that he gave other support to the applicant which culminated in and is evidenced by an agreement which should be deemed not to be a collective agreement pursuant to section 48.

56. The applicant, once it knew it was to be certified, gave notice to bargain to Sitka. There was nothing improper about that. Indeed, the applicant had, in effect, sold itself to the employees because of their concerns about job security after Sitka ceased operating the store, and it was not unreasonable for it to try to have a collective agreement in place by October 14th if possible. The applicant also framed a set of proposals to present to Sitka. The Act says that bargaining must take place and that the parties must, in good faith, attempt to reach an agreement. The Act does not say that Sitka had to agree to the proposals which the applicant presented or that Sitka must agree only to reasonable proposals. In short, the Act does not generally intrude on the content of collective bargaining. Sitka's duty to act in good faith under section 15 of the Act extends to the applicant and applies only to the process of bargaining with the applicant; the Act does not impose a duty on Sitka to act in good faith toward the respondent or anyone else.

57. Mr. Sitka may well have agreed to a collective agreement which no reasonable employer would have agreed to; that is not for this Board to determine. If either Mr. Sitka or Sitka or both can be shown to have breached any duty owed to either the respondent or Koffler or both of them, then that is a matter for another forum because the Legislature did not establish any duty of that sort under this Act. The circumstances of this case are such that one must regard Mr. Sitka's protestations of innocence with a jaundiced eye. He was being deprived of his Shoppers Drug Mart franchise; he was about to enter into direct competition with the Shoppers operation; his relationship with Koffler was not good; he had only a few

weeks left to operate the store and yet he proceeded to enter into a three-year collective agreement without even telling anyone connected with Koffler or the respondent what he was doing. Be that as it may, there is no evidence to show that the applicant was anything other than a *passive recipient of Mr. Sitka's uninvited generosity*, or the beneficiary of an innocent inexperienced bargainer. The applicant did not court Mr. Sitka's favours and it was under no obligation under the Act to ensure that he act fairly toward the respondent and/or Koffler. There is, in short, absolutely no evidence of any complicity between any agent of Sitka and the applicant.

58. Although the Board has never considered a case quite like this before, it was determined in *J. C. Milne Construction Co. (Canada) Inc.*, [1979] OLRB Rep. Mar. 220 that the presence of non-existent classifications in a collective agreement was not evidence of improper support or interference with the rights of employees to select their bargaining agent. In *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, although admittedly there was no allegation of impropriety, the Board also refused to analyze the collective agreement to determine whether it was inappropriate in the context of the business which was sold. Therefore, it would be our conclusion that the fact that a collective agreement may be termed inappropriate or unfavourable to the employer does not necessarily mean that the agreement should be caught by section 48. Just as in the case of a section 13 bar, there needs to be some evidence of actions tantamount to solicitation of support on the part of the trade union to bring section 48 into play. As the Board said in *Deacon Brothers Ltd.*, 46 CLLC ¶16,412 at page 1103:

The fact that an employer has engaged in activities which are forbidden by the Regulation will not in every case necessarily bar a trade union or employees' organization which has benefited thereby. It is conceivable that an employer may take it upon himself to support a trade union or employees' organization on his own initiative. If the organization has not solicited or invited that support, we should hesitate to condemn the organization because it failed to repudiate the employer, although, no doubt, we should be inclined to scrutinize the affairs of such an organization rather closely to satisfy ourselves that there has been in fact no solicitation.

In this case, there was no solicitation of support. The worst that can be said of the applicant's conduct is that it may have expected that there was some ill will on Mr. Sitka's part against Koffler and that it may have hoped to take advantage of that situation. This may be a situation where the applicant threw temptation Mr. Sitka's way and he succumbed. That is the worst characterization possible, on this evidence, concerning the applicant's actions, and it is not sufficient to invoke section 48.

59. It should be kept in mind in this case that the applicant had the right to initiate bargaining before the respondent actually took possession of the business. In fact, as pointed out earlier, the applicant had assumed an obligation to its members to try to ensure that they would retain their jobs in spite of the transfer; and the initiation of bargaining, with the hope of having a collective agreement in place before the respondent took possession of the store, is entirely consistent with this obligation. The respondent and Koffler both had notice of the applicant's certification and could have acted to involve themselves in any negotiations or to prevent Sitka from negotiating; however, neither took any action of that sort to protect their

interests. Sitka was the employer at the time and the applicant would have no right to demand that anyone other than Sitka negotiate with it. Therefore it was in a position where, if it wished to negotiate, it had to do so with Sitka. Sitka was under no obligation to enter into a collective agreement. The negotiations could have gone on for days or weeks or months and Sitka would have disappeared naturally from the table. They did not do so. One may speculate on why this was the case; however, to hold from this that the applicant acted improperly would be tantamount to holding that whenever in one session a trade union negotiates a collective agreement, which can be shown to be more favourable to it than to the employer, there must have been some improper support given to the trade union by the employer which would allow the Board to invoke section 48. As stated earlier, the Board requires some evidence of wrongdoing on the part of the trade union and, where there is none, will not invoke section 48. There is no such evidence here.

60. Section 63(2) of the Act does imply that there may be an independent discretion to declare that the transferee is no longer bound by a collective agreement. Leaving aside the jurisprudence for the moment, if such a discretion exists, the idea of exercising it has its appeal in a case such as this one. It is difficult to view this situation objectively and not conclude that the respondent has been treated improperly by Sitka and by Mr. Sitka in particular. The content of the collective agreement aside, the idea of the respondent being bound for three years to a financial obligation negotiated by someone who was about to be his competitor is one which is disturbing. One great difficulty with exercising discretion, though, is that it would be directing action against the interests of innocent parties and not affecting the interests of the party who created the situation in the first place.

61. In *G. A. C. Industries Ltd.*, [1981] OLRB Rep. June 658, it was held that section 63 (then section 55) does not give the Board the sort of broad discretion to declare that a collective agreement does not flow through to a transferee or purchaser of a business. It was concluded that the discretion in section 63(2) was limited to dealing with those particular circumstances set out in the balance of the section. We agree with the reasoning contained therein and conclude that there is no general authority to declare a collective agreement at an end contained in section 63(2) and that whatever authority to so declare which may be contained therein must be read in the context of the rest of section 63.

62. For all of the reasons set out herein, we conclude that there has been a sale of a business and that the respondent is bound by the collective agreement between Sitka and the applicant, and we so declare.

63. The decision of Board Member J. A. Ronson will follow.

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**2420-81-U** Teamsters, Local 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. **K Mart Canada Limited**, Respondent.

**Trade Union – Unfair Labour Practice – Union security provision incorporating statutory dues chechhoff – Employer submitting lump sum of union dues deducted – Denying requirement to file employee list or reveal identity of employees from whom deductions made – Whether that information matter for collective bargaining – Whether employer must disclose employees’ social insurance numbers**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members S. Cooke and J.A. Ronson.

**APPEARANCES:** *D.J. Wray and J. Bigeau for the complainant; R.A. MacDermid and C.A. Cumiskey for the respondent.*

**DECISION OF R.O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE;** June 30 1982

1. This is a complaint under section 89 of the *Labour Relations Act*. The section of the Act primarily at issue is as follows:

“43(1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.”

(2) In subsection (1), “regular union dues” means,

- (a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union; and
- (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

2. The complainant trade union is the certified bargaining agent for a unit of the respondent’s employees. Following certification, the parties engaged in a protracted and difficult process of negotiations which ultimately resulted in a collective agreement. (The bargaining background is more particularly set out in *K Mart Canada Limited*, [1981] OLRB

Rep. Oct. 1421.) The union security clause incorporated in that collective agreement was the statutory minimum required by section 43 (formerly section 36a). It provides:

“19.01 In accordance with section 36a of the Ontario Labour Relations Act, each employee covered by this Agreement, whether or not such employee is a member of the union, shall have deducted from his wages the amount of the regular union dues. The total deductions made by the employer shall be remitted to the trade union forthwith.”

This clause was the employer's response to a union request for a “section 43” union security provision — a provision to which it was entitled as a matter of law. The parties are agreed that Article 19 was drafted in intended compliance with section 43, and was accepted by both of them on that basis. The union requested, and the employer conceded the minimum required by the statute. It was only later that a dispute arose between the parties as to what section 43 actually required, and whether the employer was complying with this minimum statutory requirement. The agreement also contains a seniority clause giving preferential treatment to senior employees, and a clause providing that probationary employees will not acquire seniority until they have worked for the company for 60 days.

3. The collective agreement was concluded on February 18, 1981. On March 5, 1981, the secretary-treasurer of the union wrote to the company setting out the procedure which the union intended to follow with respect to the calculation, collection, and accounting of union dues:

“March 5, 1981.

Please be advised that the union dues for the members of Local 419 employed in the bargaining unit at K Mart Canada Limited will be \$20.00 a month effective as of March 1, 1981.

We would appreciate it if you would send us the original listing of names, addresses, social insurance numbers and seniority date for those employees covered by this bargaining unit along with your cheque for the first month's dues. We will have these records converted to our computer system and from then on billing for the monthly dues.

If you have any further questions on this matter, please do not hesitate to call our Bookkeeper, Mrs. Mary Yamich, at the above number.”

This is the standard procedure adopted by the union in respect of its 2 million members and their employers throughout North America, and is a common method by which parties handle such matters.

4. As the letter indicates, the union does the paper work, submitting a monthly list of employees and their required dues. The employer need only indicate additions to or deletions from its employee complement, and whether for one reason or another, (for example, illness or lay-off) an employee was not immediately required to pay monthly dues.

5. There are approximately 40 employees in the bargaining unit and this number is

apparently relatively constant (although there are also a number of “temporary” employees who are not considered part of the bargaining unit). It is evident therefore, that the effort required to meet the union’s request is minimal. The number of employees involved is not large, the union’s computer does most of the work and generates a convenient format, and, in any event, the company must maintain its own record of employee dues for payroll purposes, and in order to furnish employees with accurate T-4 forms after the end of the taxation year.

6. The company concedes that it would require no effort to accede to the union’s request, and verify the monthly list provided so that the union would be able to identify which employees had paid their dues and which had not. But the employer maintains that section 43 does not require it to do this. It refuses to submit a list of employees in the bargaining unit, and refuses to specifically identify either those employees for whom dues have been deducted, or those who may be in arrears. Instead, the respondent submits a cheque for a lump sum referable to a number of employees in the unit and a number of employees “in arrears” but without specifically identifying who those individuals are. The February 18, 1982 remittance is typical:

“February 18th, 1982

Enclosed is union dues for the employee’s [sic] at Kmart [sic]  
Distribution Centre. 36 employee’s [sic] by \$20.00 equals \$720.00

Plus 3 in arrears @ \$24.00 = \$72.00

Cheque enclosed for total of \$792.00”

It is left to the union to figure out as best it can who has paid the regular monthly dues, who is in arrears, to what extent, and why.

7. The union listed a number of reasons why it was important for its internal administration to have a list of employees in the bargaining unit it represents, together with a verification that each of them has or has not paid the required dues, or is justifiably “in arrears”. A union has a statutory obligation under section 68 or the Act to represent all such employees, whether or not they are union members; and its ability to meet this statutory responsibility could well be impeded if the employer refused to provide current information as to who those employees are. Certainly, it is unusual in the Board’s experience to encounter an employer who asserts the right to mask the identity of the individuals whom the union has the obligation to represent — particularly where the collective agreement itself seems to envisage the preparation of a seniority list for employees in the bargaining unit, and the identification of “new hires” who, in the course, will pass their probationary period. Moreover, the union too provides employees with receipts for income tax purposes, and cannot do so unless it can verify that dues in a particular amount have in fact been paid. Without an employee name to match to a particular dues payment, this is difficult to do. Finally an accurate accounting of the employee dues payments is also important for the internal administration of the union. “Good standing” in the union is contingent upon maintaining proper payments. The availability of “withdrawal cards” (for people off sick, or out of work but still in good standing), the right to participate in certain union affairs, (eligibility for union office, the right to vote for union officers, and so on, all depend upon the payment of dues in accordance with the constitution. All of these matters are somewhat remote from the wage-work bargain with



which the employer may be legitimately concerned, and in the union's submission, the Legislature could never have intended an interpretation of section 43 which raises such difficulties.

8. Of course, these problems are not insurmountable. Each month, upon receipt of the employer's remittance, a union representative could conduct a canvass of all of the employees whom he believes to be in the bargaining unit, going from employee to employee, in order to identify who has or has not paid the required union dues, who was in arrears, and why. Each employee potentially in the unit could be asked whether his dues had been properly deducted, whether he was "in arrears" whether he had been ill, and so on. By this method, it might well be possible, with appropriate effort, to verify the employee complement and confirm that the union security provision required by the statute has, in fact, been complied with. But is that what the Legislature intended when section 43 was enacted? And why has the respondent taken a position which *ex facie* has no other purpose than to make things as difficult for the union as possible? It is clear that there is no business justification for the respondent's position. Its sole purpose is to hinder the union in the conduct of its affairs. The respondent contends however that its conduct is in strict compliance with the limited requirements of section 43 and the collective agreement, and it is under no obligation to go further. In its submission, it need not have any business justification for its position.

9. Section 43 (then an amended section 36a) was introduced in 1980, and replaced the "old" section 36a which provided for a voluntary revocable checkoff of union dues from employees who indicated their wish to support the union financially. The "old" section 36a read as follows:

36a.-(1) Except in the construction industry, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision that *at the written request of an employee in the bargaining unit* the employer shall deduct from the wages of the employee the amount of the regular union dues payable by members of the trade union and remit the amount to the trade union.

(2) In subsection 1, "regular union dues" means,

(a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union; and

(b) in the case of an employee who is not a member of the trade union, the dues referred to in clause a, excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union."

(emphasis added)

The amendment was part of a package which included section 40 permitting an employer to

require a vote of his employees on his contract proposals, and section 72(5) which increased the rights of non-members to participate in strike or ratification votes. The package, therefore, represents a balance: non-members are given enhanced rights to participate in decisions which may affect them, but, by the same token, each employee must bear some of the financial burden for the union's representational activities.

10. Both the old section 36a and its amended version in section 43, deal with the question of "union security". There is perhaps no single issue which has contributed more to industrial conflict in this province — especially in first contract situations where the union may be seeking to establish its legitimacy in the face of employer opposition. Once certified, unions typically insist on a "checkoff" of dues from all employees as the natural concomitant of their statutory obligation to represent members and non-members alike (see section 68), and as the only means of financial support for the representational activities which benefit all employees. But not infrequently, employer resistance on this issue has resulted in a strike. Sometimes this opposition is merely a manifestation of loyalty to non-member employees; but sometimes, it has been part and parcel of an employer refusal to recognize the union, despite its certification, or an element in a general pattern of unfair labour practices designed to undermine the union's position. (See for example: *Radio Shack* [1979] OLRB Rep. Dec. 1220; *Fotomat* [1980] OLRB Rep. Oct. 1397; *Wilson Automotive* [1980] OLRB Rep. July 1136, [1980] OLRB Rep. Sept. 1337; *Fleck Manufacturing Company* [1978] OLRB Rep. July 615). These cases may be atypical, however, even when the employer's opposition is legitimate, (see: *Cross Tube Products Inc.* [1980] OLRB Rep. May 669), there is little doubt that the effort to attain union security has been a key factor in a number of protracted, difficult and often ugly disputes which have marked the collective bargaining scene in recent years. Indeed, in 1975, the "checkoff" was the principal issue in dispute between the parties herein, leading to a six month strike, and it might have precipitated a strike in 1980, when the union was certified for a second time, if the legislation had not removed that item from the bargaining table. See: *K Mart Canada Limited, supra*). The recognition that the union security issue was a flash point in the bargaining process is what prompted the Legislature to enact the succession of amendments mentioned above. And until the instant case arose, it was widely thought that a demand for the "checkoff" could no longer be the basis for a strike in this jurisdiction.

11. The question raised by this complaint then, is the extent to which the union security issue in the form of a statutory "checkoff", has been removed from the bargaining table. Does the union have a right to know specifically the identity of the employees in the bargaining unit it represents, and whether dues have been properly remitted on behalf of those *specific* individuals? Or is the right to this information a bargaining issue for which the union must ultimately strike if the employer is not prepared to provide it? If the principle of the checkoff has now been given statutory recognition and underpinning, must the union still strike to achieve a formula that is workable from an administrative point of view. In other words, is the "checkoff" a "live" bargaining issue and a potential source of industrial conflict despite section 43 — for it must be remembered that although the bargaining unit is relatively small in this case, the principle flowing from it would be equally applicable in a much larger bargaining unit where there would be no effective means of verification.

12. There is no legitimate employer interest in masking the identity of its employees, and it is a little difficult to appreciate why the Legislature would choose the formula which the respondent's interpretation involves. If anything, it is the union which has a legitimate interest in obtaining such information because of sections 43 and 68 of the Act, and its statutory role as

the employees' bargaining agent. The dues deducted do not "belong" to the employer. It is merely the agent for the union for the purpose of collection. Thus, we do not find particularly compelling the employer's submission that the information the union seeks is a matter for collective bargaining. On the contrary, in our opinion, the acceptance of this position would put back on the bargaining table the very kind of inflammatory issue which section 43 was designed to resolve — with obvious detriment to the orderly process of collective bargaining which the amendment was intended to promote. This Board does not lightly contemplate an interpretation of the Act that would once again see strikes in Ontario on the issue of union security — not for the principle of a checkoff, for that was clearly established by section 43 but this time for a formula that would make section 43 workable. In our view, such an interpretation of section 43 flies in the face of its obvious intent, and we should not embrace it in the absence of clear and compelling statutory language.

13. Section 43 requires a clause providing for dues to be deducted "from the wages of *each* employee in the unit affected by the collective agreement". The use of the word "each" certainly suggests an individual treatment rather than the remission of an undifferentiated lump sum on behalf of the unit as a whole. If the latter had been intended, one would have expected more generalized language referring to the employees in the bargaining unit as a group. For example, section 72(5) (which as noted above was enacted at the same time as section 43) extends voting rights to "all employees in the bargaining unit". Moreover, section 43(2) clearly envisages different classes of employee, and different benefits to which they might contribute or be entitled. Since it is not unreasonable to expect that an employee may change status from time to time (for example on completion of a probation period), or for one reason or another be relieved of paying dues under the union's constitution, this too suggests the need to identify the employees concerned.

14. *The Concise Oxford Dictionary* defines the word "each" as: "of two or more, every one taken separately". On one gloss of the language of section 43, therefore, one might suggest that an employer was required to forward to the union a number of separate and distinct sums in respect of each individual employee. On the other hand, the employer maintains it need only send an undifferentiated lump sum, leaving it to the union to ascertain who the dues payments should be attributed to. But the former view is not in accordance with common sense and business efficacy, while the interpretation proposed by the respondent would undermine the significance and effectiveness of section 43. In view of the background and purpose of section 43, we cannot conceive that the Legislature intended that a union would have to bargain about, and strike for, disclosure of the identity of the employees on whose behalf the remission of dues is required by statute. A lump sum remittance but identifying who the money comes from seems a much more reasonable interpretation, and, as noted above, is the usual way the "check-off" is handled. In our opinion, the obligation to deduct the designated amount from the wages of *each* employee carries with it the concomitant obligation to specify for whom such payments are being deducted and who is in arrears. It is our view that the clause envisaged by section 43 requires more than the remittance of an undifferentiated lump sum on behalf of an unidentified group of employees. We find therefore that the respondent is in breach of the collective bargaining obligation required to be in its agreement by section 43. The Board directs the respondent to provide the union, at the end of each month, with: the name of each employee on whose behalf union dues have been deducted; the amount of union dues so deducted; the amount by which any individual in the bargaining unit is "in arrears", and the apparent reason for such arrears.



15. The union also requested that the respondent divulge the employees' social insurance numbers, since that is the way that the information is cross-referenced in its computer. In our view, however, the respondent need not reveal the employees' social insurance numbers. No doubt, the possession of such information would facilitate the union's task in accounting for the funds received; but while the efficacy and utility of section 43 requires identification of the employees in the unit, in the manner described above, we do not think there is any basis for requiring disclosure of those employees' social insurance numbers.

16. In view of the decision we have reached concerning the interpretation of the employer's obligations under section 43 (which, as noted above was the primary issue before us), it is unnecessary to address the union's alternative argument that the employer's conduct constitutes a breach of section 64.

#### **DECISION OF BOARD MEMBER S. COOKE;**

1. I agree and comment:

- (a) In addition to the reasons set out by Vice-Chairman R.O. MacDowell, section 64 proscribes support to the union in the following words "or contribute financial or other support to the union". The transmission of money from a company to a union must therefore be accompanied by detailed identification for each \$1.00. Failing this, both parties would be unable to make a good defense should charges arise. Further in my opinion, the "administration of a trade union" is interfered with contrary to section 64 by the refusal to provide the information on dues checkoff in such a way as to clearly identify how much money was deducted from the wages of "each employee in the unit" as set out in section 43.
- (b) The respondent in this case could give no business reason for its action. The respondent attempts to hide behind a narrow interpretation of section 43. If that interpretation were accepted, the purpose of the legislated amendment which brought about this section would be lost. "Remove this contentious item from the bargaining table."

2. In my experience with collective bargaining, no other issue holds like potential for labour relations disruption. Union security and union dues checkoff as a minimum provision in that area have been an issue central to the disputes that have raged in this province for forty years. Any interpretation that tends to return this issue to the bargaining table will cause great mischief.

#### **DECISION OF BOARD MEMBER J. A. RONSON;**

1. During the negotiations for the collective agreement now in place, the employer and the union came to an impasse over the wording of a clause that would comply with the requirements of what is now section 43 of the *Labour Relations Act*. Enacted in 1980, that section of the Act provides that, upon the request of the union, the employer shall collect

regular union dues for the union (by way of payroll deduction from the wages of each employee, union member or not) and "remit the amount to the trade union, forthwith".

2. The union wanted the clause worded so that the employer would be obligated to provide the names, addresses and social insurance numbers of each employee for whom the employer was making a payment. The employer flatly refused to provide such names and numbers. Eventually the parties agreed to the following clause which conforms strictly to the wording of section 43.

"19.01 In accordance with section, 36a of the Ontario Labour Relations Act, each employee covered by this Agreement, whether or not such employee is a member of the union, shall have deducted from his wages the amount of the regular union dues. The total deductions made by the employer shall be remitted to the trade union forthwith."

3. Less than a month after the collective agreement was concluded the union, by letter, again requested the names, addresses and social insurance numbers of the employees for whom payment was being made, and again the employer refused. The union then brought this complaint to the Board, alleging that by so refusing the employer had contravened sections 43, 64 and 89 of the Act. It is noteworthy that the union did not see fit to bring a complaint against the employer for bargaining in bad faith when the employer first refused during bargaining. As a result, and since this is also a case of first impression, I intend to treat the application as one for declaratory relief only.

4. Anyone with some familiarity with labour relations issues will agree that the particular issue dealt with in section 43 can be described succinctly as explosive. Feelings run high in the employer and union communities and amongst those employees who are represented by union but are not union members. In such a situation it serves no useful purpose for the Board to climb down into the arena and act as champion for one of the combatants. Rather it is the Board's responsibility to try and effect the instructions of the Legislature when it has spoken to the issue.

5. Logically one must assume that the Legislature did not intend to create new problems when it enacted section 43. The nature of the obligation imposed on an employer is to deduct money from the employee's wages and, on behalf of that employee, remit the money to the union. In order to prevent grievances between employers and unions, and disagreements between employees and unions and employees and employers, the remitted money has to be identified in some way. The employee must be advised that the union dues amount has been deducted from his or her wages. Usually, as in this case, the notification is made on the payroll cheque issued to the employee. Conversely the union must be advised that it is receiving a specific amount to the credit of the employee.

6. Now this does not mean that the employer is obligated to keep accounts and records as to how much money has been sent to the union to the credit of each employee (although as a matter of prudence many employers may wish to do so). Nor does it mean that the employer has to concern itself with the situation of the dues account vis-a-vis the union and the employee. What it does mean, in the context of monthly union dues, is that once a month the employer must:

- (a) deduct the regular union dues from the wages of each employee;
- (b) advise the employee of the amount deducted;
- (c) remit the amount deducted to the union; and
- (d) advise the union of the specific amount remitted for each named employee.

7. And I would so declare.

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**0142-82-R Neil Edward Whittaker, Applicant, v. International Brotherhood of Electrical Workers 804 and A. R. Milne Electric Ltd. Respondent**

**Petition – Practice and Procedure – Termination – Only one employee need exist to file termination application – Employer involvement in application – Board not satisfied petition voluntary**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members W. G. Donnelly and H. Simon.

**APPEARANCES:** *N. E. Wittaker for the applicant; L. Banack and J. Wilson for the respondent.*

**DECISION OF THE BOARD; June 30, 1982**

1. This is an application for termination of bargaining rights filed pursuant to section 57 of the *Labour Relations Act*. The relevant portions of that section are as follows:

57(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if no less than 45 per cent have so signified, the Board shall, by a representa-



tion vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. In the instant case, there is only one employee in the bargaining unit, and for this reason, the respondent union argues that no termination application can be brought. The union points out that on a certification application, the Act prevents the Board from determining an appropriate bargaining unit unless such unit consists of more than one employee; moreover, the term "bargaining unit" is defined in section 1(1)(b) to mean a "unit of *employees* (plural) appropriate for collective bargaining". The union argues, by analogy, that if two employees are required for a bargaining unit to be certified, bargaining rights cannot be extinguished unless there are at least two employees in the unit. The union also questions whether there is a bargaining unit at all in this case, when the definition of that term appears to require a collectivity.

3. We cannot accept these contentions. In the construction and related industries, the number of employees in a bargaining unit can fluctuate substantially, and from time to time, the bargaining unit may even be vacant. Indeed, section 121 of the Act contemplates that the parties can negotiate a collective agreement even if there are no employees in the bargaining unit at the time the agreement is entered into. It is inconsistent to assert as the union does that there is no "bargaining unit", while at the same time maintaining that it continues to represent the applicant employee; and, we would not lightly embrace an interpretation which could conceivable lock an employee, unwillingly, into a bargaining unit with no possibility of escape, even in the "open period" prescribed in section 57(2)(a). In our view, such submission is entirely inconsistent with the scheme and purpose of the Act. Section 57(2) provides that *any of the employees* in a bargaining unit may make a timely application to terminate bargaining rights, and we are satisfied that the applicant has properly done so here.

4. A more difficult question is whether the Board can be satisfied that the application is truly voluntary, for on the evidence, it is apparent that the applicant's employer has been involved with the application from its very inception. Mr. Wittaker testified that there were certain instances in which he was dissatisfied with the quality of representation which he was receiving from his union, and there is no reason to doubt his evidence in this regard. But insofar as the application for termination itself is concerned, the employer's involvement makes it particularly difficult for the Board to determine whether the application truly represents Mr. Whittaker's own choice, as distinct from the choice of his employer.

5. Mr. Whittaker testified that when he began to consider applying to the Board to terminate the union's bargaining rights, he went to talk the matter over with his employer. He told the Board that he would not have launched the application if his employer did not approve. Not surprisingly, his employer had no objections, and even assured Mr. Whittaker that if the union's bargaining rights were terminated, he (Whittaker) would still receive wages and benefits comparable to any union settlement. Neither Mr. Whittaker nor his employer were certain about how a termination application could be made, so his employer indicated that he would contact the firm's solicitors to take care of the matter. This he subsequently did. Those solicitors obtained and prepared the documentation initiating this application, together with a covering letter for Mr. Wittaker's signature. Once this material was prepared, Mr. Whittaker picked up the documents and signed them. But they were not mailed immediately. It took Mr. Whittaker a month to actually mail the material to the Board, for, he testified, he

was having second thoughts about his course of action. However, his employer asked him 2 or 3 times whether the termination application had been filed, and he eventually did so.

6. The Board has always been sensitive to the particular vulnerability of employees arising from their dependent position in the employer-employee relationship. The employer has substantial control over his employees' livelihood, and this, in turn, gives him the ability to influence his employees, by rewarding or encouraging conduct of which he approves, and discouraging conduct of which he disapproves. In *Pigott Motors (1961) Limited* 62 CLC ¶16, 264, the Board put the matter this way:

"There are certain facts of labour-management relations which this Board has as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form or a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories."

Of course, employer antipathy to trade union representation is neither unusual nor, in itself, illegal; but, given the power of the employer to influence the wishes of his subordinates, the Board must be especially scrupulous in its concern to protect the right of those subordinates to make their own choice, as distinct from that of their employer, in the matter of trade union representation — especially in a small bargaining unit where employee wishes (whether on the application itself or in a representation vote) will be clearly identified.

7. The Board has before it a cogently worded statement of desire in opposition to continued union representation; but in all the circumstances, the Board cannot be satisfied that it is a truly voluntary expression of the individual concerned. It is clear on the evidence that the employer has been involved with the application since its inception, provided the applicant with direct assistance in having it prepared, and was actively interested in its filing — even when the applicant himself was considering whether he would actually do so. This is not to imply that there was a pattern of conscious or deliberate impropriety on the employer's part. It is simply that on the evidence the Board cannot be satisfied on the balance of probabilities, as it must be, that the statement in opposition to the trade union is voluntary.

8. For the forgoing reasons, the application is dismissed. We do not wish to leave this matter without noting that there was some evidence that at some time in the past, when the

employer's operation was larger, the applicant may have exercised certain functions which were arguably "managerial" within the meaning of section 1(3)(b) of the Act. He does not do so now, and has not for some time; but if that situation should change it may well be that pursuant to section 1(3)(b) he would not be considered an employee within the meaning of the Act.

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**0962-81-R; 1033-81-R** Labourers' International Union of North America, Local 183, Applicant, v. **Monte Carlo Carpentry**, Respondent  
 United Brotherhood of Carpenters and Joiners of America, Local 1190, Applicant, v. **Monte Carlo Carpentry**, Respondent, v. Labourers' International Union of North America, Local 183, Intervener

Certification – Construction Industry – Reconsideration – Labourers' Union filing certification application – Carpenters' Union filing subsequent application prior to terminal date in Labourers' application – Carpenters' application not processed by Board due to administrative error – Carpenters' union failing to pursue its application on not hearing from Board – Board certifying labourers' union which commences negotiations and reaches strike position – Board not revoking labourers' certificate

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members E. J. Brady and M. J. Fenwick

***APPEARANCES:** Jeffrey Sack, Naomi Duguid and Chester De Toni for Labourers' International Union of North America, Local 183; no one appearing for the respondent; Douglas Wray, Jim Tobin and Frank D'Abbondanza for United Brotherhood of Carpenters and Joiners of America, Local 1190.*

**DECISION OF THE BOARD;** June 29, 1982

1. The Board issued a decision August 12th, 1981 certifying, without a hearing, Labourers' International Union of North America, Local 183 ("Local 183") with respect to a bargaining unit described as follows:

All carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the Industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

The application had been made on July 27, 1981 and the terminal date set for the application was August 7th, 1981.



2. The United Brotherhood of Carpenters and Joiners of America, Local 1190 ("Local 1190") also filed an application for certification on August 5th, 1981 for a bargaining unit comprised of carpenters and carpenters' apprentices. As the date of that application indicates, it was made two days prior to the terminal date of August 7th in the Local 183 application and one week prior to the date when the Board issued its certificate to Local 183. Local 1190's application for certification was not processed at that time as a result of an administrative error of the Board. On April 7th, 1982, counsel for Local 1190 wrote to the Board and requested that its application be processed and in so doing, requested the Board to exercise its discretion under section 106(1) of the *Labour Relations Act* to reconsider the decision made August 12, 1981 to certify Local 183 and to revoke that certificate.

3. The Board respondent to that request by sending notice of the application in the customary form to the respondent and to Local 183 and sent copies of the Board's customary notice to each employee identified by Local 1190 as being at work for the respondent on the date of its application. Local 183 intervened in this application on several grounds, one of which was that its certification dated August 12th was a complete bar to the application. The Board listed the application for hearing on June 4th for purposes of:

hearing the evidence and the representations of the parties with respect to all matters arising out of and incidental to the application, including the matters raised in the Intervention filed by Labourers International Union of North America, Local 183.

4. Counsel for Local 1190 took the position at the hearing that Local 183 had been certified fortuitously as a result of the Board's failure to process Local 1190's application for certification. He contends that Local 1190 did not become aware of the possibility that Local 183 had been certified until mid-March 1982. Local 1190 then instructed counsel to inquire into its application and, as a result of that enquiry, the April 7th letter was addressed to the Board. Counsel contends further that Local 1190 should not suffer as a result of the Board's error and that the Board should treat its application in the same manner as it would have been treated in the first instance, but for the Board's mistake. Counsel correctly asserted that the Board's normal procedure would have been to exercise its discretion pursuant to section 103(3)(a) of the Act and treat Local 1190's application as though it had been made on July 27th, 1981, the same date as Local 183's application and if both applicants demonstrated the requisite membership support, a representation vote would have been held allowing the employees the choice of being represented by one or other of the applicants, or by neither. Counsel also contends that, if Local 1190's request is denied, it would be prejudiced by the Board's failure in the first instance to process its application, whereas, counsel asserts, there would be no prejudice to Local 183 because it has been unable to conclude a collective agreement with the respondent.

5. Counsel for Local 183 takes the position that Local 1190 was responsible for the carriage of its application and has failed to act with due diligence in that respect. Local 183 has relied on the certificate issued by the Board and has attempted to bargain a collective agreement with the respondent. When its initial attempts failed, it requested the services of a conciliation officer and subsequently has reached a position where it may lawfully strike. No strike has been called, but since reaching a lawful strike position, Local 183 has presented a collective agreement to the respondent and met its principal at its job site on several occasions in attempts, as yet unsuccessful, to obtain settlement of the agreement. Counsel contends that

Local 183 would be seriously prejudiced were the Board to revoke its certificate and re-process its application together with that of Local 1190. This prejudice, it is contended, would arise from the expenditure of effort and expenses in attempting to negotiate a collective agreement and from the circumstances in which a representation vote would be held, were the Board to direct a vote. Counsel claims that a vote between Local 183 and Local 1190 would appear to the employees as being a vote for a strike if they vote for Local 183 or a fresh start and nothing to lose if they vote for Local 1190. For these reasons, counsel argues, the Board should exercise its discretion under section 103(3)(c) to dismiss Local 1190's application or, in the alternative, refuse its request for reconsideration.

6. The applicants were in the midst of intensive, competing organizing campaigns amongst the employees of carpentry contractors in housing construction when these two applications were filed with the Board. Local 1190 filed in excess of 100 applications during the campaign and James Tobin, an International Representative of the United Brotherhood of Carpenters and Joiners of America, was involved in 95 per cent of them. Tobin told the Board that he filed Local 1190's application herein and he recalled that it was during the postal strike. The Board's records show that it was delivered by hand. Tobin did not hear anything further from the Board and he did not receive any notice of the application that had been filed prior to his by-local 183. Tobin realized that the application was outstanding only when two of his business agents told him in mid-March 1982 that there were rumours on the job site that Local 183 had been certified to represent the respondent's employees. It was that event which prompted the April 7th letter from counsel for Local 1190. Tobin is wholly familiar with the Board's procedures for processing applications for certification in the construction industry and, in particular, was aware that he should have got a notice from the Board acknowledging receipt of the application and setting a terminal date for it. Although Tobin did not receive that notice, he did nothing about his application in the interval between August 5th and mid-March when he began the steps which gave rise to the April 7th letter. All of this time he was in possession of the membership cards which had been signed, before the application was filed, by the employees whom Local 1190 had organized. The record shows that all of these cards were dated July 10, 1981.

7. Quinto Ceolin, a business representative of Local 183 testified about the Local's actions following its certification as bargaining agent for carpenters, carpenters' apprentices and construction labourers employed by the respondent. It sent notice of its desire to bargain a collective agreement to the respondent and to a number of other carpentry contractors for whose employees it had been certified. It attempted to bargain with the contractors as a group, but was unsuccessful in getting many of them to attend meetings. Local 183 requested and was granted the services of a conciliation officer who was appointed October 12, 1981. The officer was unsuccessful in two attempts to convene meetings of the contractors and Local 183 ultimately received a "no board report" on November 12th, so by the end of November Local 183 was in a lawful strike position. It has not called a strike, however. No bargaining was attempted during the winter months when there was little or no construction activity. Meetings were resumed in February 1982. On February 4th and again on March 12th the respondent attended negotiating meetings together with half a dozen other carpentry contractors. Apparently there were other such meetings, but the respondent did not attend them. Business representatives of Local 183 did meet with the respondent on his job sites at least seven times between March 3rd and May 10th. At all of these meetings the representatives attempted to get the respondent to sign a collective agreement which had been presented to him at the first of the meetings. No further attempts have been made since Local 183 received the notice of hearing into these matters.



8. The construction industry provisions of the Act and the Board's Rules of Procedure which apply to applications for certification in the construction industry, together with the Board's discretion under section 102(14) which relieves the Board of the need to hold a hearing into such applications, operate to allow expedited handling of construction industry applications for certification. Section 89 of the Rules of Procedure require the Registrar to set a terminal date not less than four nor more than six days after the date when notice of the application is served on the employer. For non-construction applications the comparable time period is not less than five nor more than ten days. Section 91(1) of the Rules of Practice direct the Registrar to notify the applicant of the terminal date by serving it with a notice fixing that date. An example of how this operates is provided by the manner in which Local 183's application was processed. The application was delivered by hand to the Board on July 27th, 1981. The Board's notice fixing the terminal date was issued the next day, July 28. It was accompanied by a form letter which, *inter alia*, advised the applicant that notices to the employees about the application had been sent to the employer with instructions to post them where employees could see the notices. The letter instructed the applicant to advise the Registrar if there was any delay or failure to post the notice and return forthwith the advice of posting card included with the letter. The letter also enclosed a Declaration Concerning Membership Documents, Construction Industry and instructed the applicant on the due filing of that document and the membership evidence on which the applicant would be relying. The advice of posting card was returned and the declaration together with membership evidence was filed by the terminal date August 7th. On August 12th the Board issued its certificate to Local 183.

9. It is regretable that the parties hereto are confronted with these problems as a result of the Board's administrative error. It is patently clear that Local 183 has relied and acted upon its certification and the bargaining rights which the certificate established in order to seek a collective agreement with the respondent. It was not only entitled to do so, but was obligated to act promptly if it wished to preserve those rights. As a matter of fact, the Act operates to give a newly certified bargaining agent a period of stability by giving it twelve months free of the risk of being displaced as bargaining agent. Local 183 was still within that period at the time these matters were brought on for hearing.

10. Just as Local 183 is entitled to rely on the Board's certificate, Local 1190 is entitled to rely on the Board's administrative procedures in order to have its application processed expeditiously and it should not be prejudiced by any failure of the Board to process the application. Coupled with this entitlement, however, the applicant has responsibility for carriage of the proceedings with respect to its application and can determine whether to proceed with or withdrawn the application. Therefore Local 1190 had a responsibility to pursue its application when it did not get processed in the normal manner. It failed to do so for some eight months, notwithstanding the fact that it had on hand the membership documents for those employees of the respondent whom it was seeking to represent. That lapse allowed the Board's error to go undetected for those eight months. The time frame within which Local 183's application was processed is fairly typical of the processing of uncomplicated applications for certification in the construction industry, in fact a certificate will usually issue on the first or second business day after the terminal date. Tobin is an experienced trade union representative and fully familiar with the Board's procedure with respect to applications for certification. He knows that he should receive promptly following the filing of an application the notice fixing the terminal date and the accompanying documents and instructions.

11. In order to for the Board to determine whether to exercise its discretion under



section 106(1) of the Act to revoke the certificate issued to Local 183, it is necessary for the Board to attempt to balance the interests of the three parties affected by the two applications and to assess the impact of the Board's decision on those interests. The respondent did not attend the hearing and was not represented at it, therefore the Board has no submissions from the respondent about possible prejudice to it arising out of how the Board exercises its discretion. There can be no doubt that Local 1190 was the only party which should have been aware of its application having been filed with the Board. Therefore it was the only party in a position to bring to the Board's attention its error in a timely enough fashion to permit the error to be rectified without prejudice to any of the parties. It has not acted in a timely fashion. Local 183, on the other hand, has actively pursued its bargaining rights to seek to bind the respondent to a collective agreement. While none has been concluded, Local 183's efforts to date would go for naught if the Board revoked its certificate. In addition, were a representation vote to be held as a result of the Board's decision there is the possible prejudice to Local 183 of the choice between the two unions being coloured by the fact that Local 183 is now in a position to call a lawful strike. Since Local 1190 was in the possession of information and knowledge which would have allowed it to protect its interest had it acted more promptly in pursuing its application and since it appears to the Board that Local 183, which was not in a position to protect its interest vis a vis the Board's error, would suffer prejudice even though it has acted with reasonable diligence in exercising its bargaining rights, the Board is of the view that the better balancing of interests would result from the Board not varying or revoking its decision to certify Local 183. Therefore the Board declines to vary or revoke its decision in Board File No. 0962-81-R which issued August 12th, 1981.

12. In the result, that decision and the certificate which issued with it stands and the certificate is a bar to the application of Local 1190 filed in Board File No. 1033-81-R. The application in Board File No. 1033-81-R, therefore, is dismissed.

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### **0340-82-R The Canadian Union of Public Employees, Applicant v. The Board of Education for the City of North York, Respondent**

**Bargaining Unit – Multiplicity of existing bargaining units – Board finding agreed upon unit restricted to lifeguards not appropriate – Tag end unit appropriate in circumstances**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

**APPEARANCES:** *J. H. Bird for the applicant; W. J. MacNaughton, T. M. Park and Mrs. B. J. Fickert for the respondent.*

#### **DECISION OF THE BOARD; June 23, 1982**

1. This is an application for certification wherein the applicant trade union seeks to represent certain employees of the respondent. At the hearing in this matter, both the applicant and the respondent requested the Board to find as an appropriate bargaining unit, the unit of employees agreed upon by both the applicant and the respondent. That bargaining unit is:

“all lifeguards employed by the respondent in its schools in the City of North York”

2. At the hearing in this matter, the Board raised with the parties the matter of whether in the present circumstances the Board should find as appropriate a “tag end” unit. That is, a bargaining unit in effect consisting of, “all employees of the respondent other than those covered by existing collective agreements”.

3. The parties filed with the Board a list of existing collective bargaining relations which reads as follows:

“1. All teachers Public Schools;

2. All teachers Secondary Schools;

3. Having regard to the particular circumstances of this case, the history of the collective bargaining between the parties and the agreement of the parties, the Board finds that all full-time multicultural community workers, speech therapists, and speech pathologists employed by the respondent in the Municipality of Metropolitan Toronto, save and except employees of the respondent employed in a confidential or managerial capacity, constitute a unit of employees of the respondent appropriate for collective bargaining;

4. All caretakers and matrons employed at its schools buildings in the City of North York, save and except assistant-supervisors and persons above the rank of assistant supervisor;

5. All its employees in its Transportation Department, Garage and Warehouse Department in the City of North York, save and except supervisors, persons above the rank of supervisor and office staff;

6. All teacher aides in the employ of the Board of Education for the Borough of North York in its schools in the Borough of North York;

7. All its office, clerical and technical employees and teacher aides employed at its schools and buildings in the City of North York, save and except supervisors and persons above the rank of supervisor, students employed during the school vacation period and employees covered by subsisting collective agreements with...”.

4. It will be seen from this list that there have been some seven appropriate bargaining units although the parties took the position that some of these bargaining units were subsequently amalgamated into existing collective agreements.

5. The parties took the position, at the hearing, that the only other group of existing employees employed by the respondent and not covered by a collective agreement were a group of seven cooks in vocational schools. Although the respondent suggested that there may be other individual employees currently not covered by collective agreements, both the

applicant and the respondent were of the view that it would be totally inappropriate to add together a unit of cooks and lifeguards since there was no community of interest. It was further suggested that if bargaining rights were sought by the applicant for these two groups, in all likelihood they would fit into two different existing collective agreements.

6. In the circumstances of this case we are not prepared to find a bargaining unit consisting of lifeguards as a unit of employees appropriate for collective bargaining. We are rather of the view that given the existing multiplicity of bargaining relationships which currently exist between the respondent and the applicant and other trade unions, that the Board should find as an appropriate bargaining unit a tag end unit.

7. In determining appropriate bargaining units, the Board has long held a policy against the fragmentation of bargaining units. Thus, in certain circumstances, where it finds specific groups of employees of an employer to be appropriate for collective bargaining, the Board in order to avoid a never ending multiplicity of bargaining relationships finds a tag end unit as the appropriate bargaining unit. In this regard, of course, it may very well be that certain employees who would have no community of interest are forced together for purposes of collective bargaining. It also, on the other hand, makes available collective bargaining to small groups of one or two employees who would not otherwise be able to avail themselves of collective bargaining. In the circumstances of the present case, there can be no doubt that the time is now ripe for the Board to find that the appropriate group for collective bargaining is all employees not currently covered by existing collective agreements or certifications and we so find notwithstanding the agreement of the parties to the proposed unit consisting of lifeguards.

8. The Board therefore finds that all employees of the respondent other than those covered by subsisting collective agreements or certifications constitute a unit of employees of the respondent appropriate for collective bargaining.

9. In view of the foregoing finding, the Board directs a Labour Relations Officer to inquire into the list of employees in the above unit.

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**2484-81-R Jegan N. Mohan, Applicant, v. Ontario Public Service Employees Union, Respondent, v. RSLs Inc., Intervener, v. Employee, Objector**

**Practice and Procedure – Representation Vote – Termination – Board refusing to inquire into employee's intentions in abstaining – Ballot not directly answering question posed "yes" or "no" spoiled – Spoiled ballot nullity and not considered as ballot cast**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and W. H. Wightman.

**DECISION OF THE BOARD;** June 3, 1982

1. This is an application to terminate the respondent union's bargaining rights. By a decision dated April 19, 1982, and for the reasons more particularly set out therein, the Board determined that a representation vote should be taken to determine whether a majority of the employees in the bargaining unit wished to terminate the respondent's bargaining rights. The vote was scheduled for, and taken on, May 10, 1982.

2. Prior to the taking of the representation vote and in accordance with the Board's usual practice, a notice to employees in Form 69 was posted on the employer's premises in conspicuous places where it would come to the attention of the eligible voters. That notice indicated the terms on which a vote would be conducted and contained a sample of the form of ballot to be used. This form of ballot was very simple. It invited the employees to register a "yes" or "no" answer to the question: "Do you wish to be represented by the Ontario Public Service Employees Union... in your employment relations with RSLs Inc.?" The form of ballot is designed to provide a clear and unequivocal choice easily understood by the employees. Indeed, the options "yes" and "no" appear as a white circle in a black field to minimize the possibility of confusion; moreover, the Form 69 notice in bold print, specifically advises employees that they should not sign, number, or otherwise mark their ballot in such a way as to reveal their identity.

3. The reasons for this format and instruction are obvious. The Board must determine the freely expressed wishes of the employees and there should be no encroachment upon the secrecy of the balloting. Anything other than a simple answer to the question posed, carries with it the potential for revealing employee wishes which the whole process is designed to keep secret. The Board cannot embark upon an inquiry into "what the employee really meant" without undermining the very secrecy which the voting process purports to guarantee. (See Form 69).

4. In the instant case, there were four eligible voters. All four appeared at the polling place. One cast a ballot in favour of the respondent; two cast ballots against the respondent; and the fourth spoiled his ballot with an indication that was neither a "yes" or "no" answer to the question posed.

5. Representatives of the applicant and respondent both signed a document certifying that the balloting was fairly conducted, that all eligible voters were given an opportunity to cast ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote. The Board has before it, however, the affidavit of an individual employee who is

apparently dissatisfied because the Board officer supervising the vote did not explain to him how he could “abstain”, or adopt a course of conduct which would have no bearing whatsoever on the outcome of the vote. The employee also complains about certain remarks made by the union scrutineer concerning the desirability of completing a ballot.

6. The Board has no inclination whatsoever to inquire into what the objecting employee “really meant” by his abstention — especially since neither the applicant nor respondent has raised any complaint about the conduct of the balloting. To undertake such inquiry would not only prejudice the secrecy of the representation vote but would also open the door to an inquiry whenever an employee seeks to explain the motivation behind his spoiled ballot. We see no reason to undertake such inquiry given the explicit instructions given to all employees and the clear and obvious choice open to them when they cast their ballot. If they do not indicate their preference for one of the two alternative choices posed, their ballot is “spoiled” and a nullity. It is as if no ballot were cast at all. (See *Re Arrow Timber Company Limited and Lumber and Sawmill Workers’ Union et al* [1973] 3 O.R. 285.)

7. In the present case, two ballots were marked unequivocally in opposition to continued representation by the trade union; one ballot was marked in favour of such representation; and one ballot was spoiled. In our view, the spoiled ballot should not be considered a “ballot cast” within the meaning of section 57(4) of the Act and accordingly the result of the representation vote is unfavourable to the respondent (i.e. 2 to 1). The Board therefore declares that the respondent union no longer represents the employees in the bargaining unit.

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**0407-82-U Sarnia Construction Association and Labour Relations Bureau of the Ontario General Contractors Association, Applicants, v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663, Respondent**

**Construction Industry – Remedies – Strike – Unfair Labour Practice – Site-wide picketing during lawful strike – Tradesmen not on strike refusing to cross picket line – Whether pickets lawful as being in connection with a lawful strike – Whether unlawful secondary picketing – Whether selective picketing contravening Act – Board considering particular needs and practices of construction industry – Restricting picketing to entrance established only for employees represented by respondent**

**BEFORE:** George W. Adams, Q.B., Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *Bruce Binning, Andy Pilat and Jim Thomson for the applicants; and L. C. Arnold and W. Robb for the respondent.*

**DECISION OF THE BOARD;** June 9, 1982

1. This is an application under section 135 of the *Labour Relations Act* for a declaration that the respondent, the United Association of Journeymen and Apprentices of

the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 (hereinafter referred to as “Local 663”) has engaged in acts contrary to sections 148(1), 74 and 76(1) of the Act and that a direction be granted requiring the respondent to cease and desist from engaging in any such unlawful acts.

2. The applicant, Sarnia Construction Association, is an employers’ organization and represents its member contractors who are affected by picketing activity at various job sites in the City of Sarnia and surrounding areas arising out of the province-wide strike called by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the “United Association”) and the Ontario Pipe Trades Council both of which are together designated as the employee bargaining agency representing, for the purposes of province-wide negotiations, the mechanical trade employees employed in the industrial, commercial and institutional sector (hereinafter referred to as the “ICI” sector) of the construction industry who are represented by United Association locals described in the legislation as affiliated bargaining agents. The respondent Local 663 is one of the affiliated bargaining agents represented by the employee bargaining agency. The Labour Relations Bureau of the Ontario General Contractors Association is a constituent element of various employer bargaining agencies for various trades currently engaged in collective bargaining in the construction industry and affected by the picketing.

3. It was agreed that all of the affiliated bargaining agents or locals of the United Association in Ontario in the ICI sector are engaging in a lawful province-wide strike and that Local 663 in Sarnia is picketing all of the sites that the employees it represents were working on prior to the strike. As a result of the said picketing, other craft employees such as electricians, ironworkers, insulators, teamsters, operating engineers, labourers, carpenters, and cement masons employed by contractors who are members of the applicant, Sarnia Construction Association, have refused to report for work as they were normally scheduled to do. It was agreed that the electricians, ironworkers, insulators, teamsters, and operating engineers were not in a strike position at the time such employees refused to report to work. Labourers and cement masons were in a strike position but had not called the province-wide strike pursuant to the legislation at the times relevant to this application. And, finally, carpenters were not in a strike position at the time of the application but have since arrived at this position although a province-wide strike has not been called pursuant to the Act. It would appear that the craft employees honouring the picket lines are employed either by single trade contractors wholly unconnected with the mechanical trades bargaining except by geography or by multi-trade contractors who do employ members of Local 663 as well as other trades. We are, however, given to understand that the single trade contractors constitute the vast majority of the contractors employing unrelated trades being adversely affected by Local 663 “site-wide” picketing.

4. It was also agreed that United Association locals or affiliated bargaining agents in the Toronto and Hamilton area who represent about one-half of the employees covered by the province-wide ICI agreement and who are engaged in the strike, are not picketing at this time. The understanding in this area is that a project will not be picketed by a striking trade unless the work previously performed by the striking employees before the strike is being performed. If someone is attempting to perform the work, site-wide picketing will prevail for the duration of the strike. This approach then balances the interests of striking employees and others working on the same sites and has made an important contribution to labour relations



stability in the area. Thus, the tradesmen of single trade and multi-trade contractors not represented by United Association locals in the Hamilton and Toronto area do not have picketing directed at them in these areas and are able to work. They are not forced to choose between trade union loyalties and legal obligations. On the other hand, the parties agree that the picketing in Sarnia has resulted in nearly all the employees, represented by other local trade unions affiliated through the Sarnia Building and Construction Trade Council with Local 663, refusing to cross the challenged picket lines except for the sheet metal workers and bricklayers who are themselves engaged in a lawful province-wide strike. All construction activity in this area in the ICI sector has therefore been brought to an abrupt halt. Counsel for the applicants alleges that the picketing conduct of the respondent constitutes improper "selective" picketing contrary to section 148(1) of the Act or improper "secondary" picketing contrary to sections 74 and 76. These provisions read:

148.-(1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.—(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the Act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lockout.

5. It is the applicants' submission that the purpose of section 148 is to provide for uniform industrial conflict when this proves necessary and that the selective picketing, inflicting greater economic harm on some mechanical trades employers than on others, constitutes a violation of the purpose and spirit of the provision. Counsel points out that certain multi-trade employers such as Comstock International Ltd., Sheaffer Townsend Construction Ltd. and Lummus Canada Inc. employ trades other than the mechanical trade employees and that, in particular, these employers are being singled out in the Sarnia area in contrast to similar multi-trade employers in the Hamilton and Toronto area who have been permitted to carry on construction with their other trades provided that the work of the mechanical trades employees is not being performed by anyone else. Alternatively, it is argued that the picketing constitutes classic secondary pressure causing unlawful strikes contrary to section 74 and 76 of the statute. Counsel emphasizes that there is no evidence or allegation that the work of employees participating in the strike is being performed by anyone else and that therefore the picketing in question can only have the purpose of causing employees of contractors not involved in the strike to engage in an unlawful strike activity contrary to sections 74 and 76. Indeed, counsel accepted that site-wide picketing would be appropriate if

the work in question was being performed. But such is not the case and it was submitted that section 76(2) is not intended to shelter such clearly secondary picketing regardless of the geographical proximity of the employees.

6. On behalf of the respondent, it was submitted that section 148 did not provide the power to the Board to regulate the strategies and tactics associated with a province-wide strike after such a strike had been called and authorized. Counsel stressed that picketing is a significant labour relations phenomenon that the Legislature would have specifically mentioned in the context of section 148 if its regulation was intended. It was submitted that over 1,000 plumbers in the Saria area were on a lawful strike and that they were entitled to demonstrate this fact. It was further submitted that the picketing employees had been employed on the various sites at which they are picketing and that in every sense of the word the picketing was “primary” and not secondary. Our attention was directed to *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207 and *George Wimpey (Canada) Limited*, [1978] OLRB Rep. Dec. 1096 which were said to stand for the proposition that as long as a lawful strike was in progress all picketing by participating employees can be said to arise out of it and is therefore protected by section 76(2). The same cases were relied on for the submission that section 74 had to be read in conjunction with the saving section in section 76.

7. We are of the view that section 148(1) does not prohibit selective picketing and, indeed, does not purport to regulate picketing associated with a province-wide strike called pursuant to the section in any direct sense. Had the Legislature intended the section to be a direct vehicle for the regulation of picketing it would have been explicit.

8. However, the concept of picketing is in many ways regulated by the more general provisions contained in sections 74 and 76 of the *Labour Relations Act* and they must be interpreted with due sensitivity to the reality of the province-wide single trade bargaining created by the statute. We also accept that section 74 must be read in light of and subject to section 76 and the saving provision in that section, i.e. subsection 2. See *Canteen of Canada Ltd.*, *supra*, paragraph 25. Viewing this application under section 135 against these sections, we observe that it was not suggested or argued before us that the application, having been brought against a trade union and not against particular officers, officials or agents of the trade union, was technically unfounded. (See the respondent’s filing on the first day this matter came on for hearing.) Rather, the matter was argued on its merits on the basis that the picketing was either sanctioned by section 76(2) or it was not and not that the applicants had chosen the wrong respondent(s). On this basis then, we are prepared to accept that by naming the respondent trade union the applicants were alleging that the officers, officials and agents of the local trade union in the general sense had sanctioned the challenged picket line and thereby had procured or encouraged an unlawful strike within the meaning of section 74 and that the same actions (i.e. the setting up of the picket lines) by such persons amounted to acts which they would know or ought to know would cause other persons to engage in an unlawful strike within the meaning of section 76(1). From this perspective the conduct of setting up picket lines which cause unlawful strikes contrary to sections 74 and 76 can be remedied by the Board under section 135 as the procuring or encouraging of unlawful strikes by officers, officials and agents of a trade union provided the allegations are made out. At no time was it suggested that it was necessary for the applicants to name an official or officer or agent of Local 663 for the matter to be entertained under sections 74 and 76. Had the issue been raised the application might have been amended at the hearing since an officer of Local 663 had notice of this matter and attended the hearing.

9. Sections 74 and 76 do deal with the concept of picketing but do not mention it specifically. See Laskin, *The Labour Relations Amendment Act, 1960*, (1961-62), 14 U.T.L.J. 116 at 120. It is well recognized in this province that a picket line can cause an unlawful strike within the meaning of the Act. See *Nelson Crushed Stone*, [1977] OLRB Rep. Nov. 713. See also *Local 273, International Longshoremen's Ass'n v. Maritime Employers' Ass'n*, [1979] 1 S.C.R. 120 and Note, *Whether Honouring Picket Lines Constitutes a "Strike"* (1979), 11 Ottawa Law Review 771. There is no argument or evidence before us that the activity of those employees who recognized the respondent's picket lines was anything other than concerted or based on a common understanding within the meaning of the legislation. We are therefore prepared to find that the actions of these craft employees constitute an unlawful strike within the meaning of the Act in that the procedural condition precedents to calling a timely and otherwise lawful province-wide strike under the statute had not been complied with prior to the work refusals in question. It goes without saying that this finding is only for the purpose of this application. The application was not brought against such employees and there is therefore no need to decide whether our discretion under section 135 ought to be exercised with respect to them having regard to all of the industrial relations circumstances. See *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 at para. 15. This then raises the question of whether the respondent can rely upon section 76(2) by arguing that the picket lines are in connection with a lawful strike and therefore protected.

10. We are satisfied that sections 74 and 76 are designed to deal with, among other things, picketing aimed at employers and employees wholly unconnected with a lawful strike. On the other hand, subsection 2 of 76 is aimed at permitting, among other things, picketing arising out of and related to a lawful strike. Some integrating and melding of purpose is therefore required in applying these various sections. Industrial relations experience has proven that neither purpose can be pursued to the exclusion of the other particularly in light of customs, practices and psychology surrounding the activity of picketing. Subsection 2 clearly protects, for example, picketing at a single employer location such as a plant or manufacturing setting where certain employees of the employer are on strike and picketing is aimed at fellow employees, suppliers, customers and others providing services to the struck enterprise. The Board has gone even further holding that picketing by employees on a lawful strike is permissible at locations of their employer other than the location at which they are employed. See *Canteen of Canada Limited*, *supra*, and *George Wimpey (Canada) Limited*, *supra*. Whether or not this approach has been too sweeping in its terms we do not need to decide on the facts before us. The causes for picketing are also infinite in variety as is the commercial activity which attracts picketing. Accordingly, broad general pronouncements are not very appropriate. See, for example, *Local 761, I.U.E. v. N.L.R.B.* (1961), 48 LRRM 2210; *Sailors' Union of the Pacific (Moore Drydock Co.)* (1950), 27 LRRM 1109; and Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388. The transfer of struck work from one location to another may present compelling reasons for expansive picketing whereas the picketing of another location involved in a totally different activity might have to stand or fall on the rationale that employees are entitled to picket an employer's entire economic domain. See *Williams v. Aristocratic Restaurants Ltd.*, [1951] S.C.R. 762; Brown, *Picketing: Canadian Courts and The Labour Relations Board of British Columbia* (1981), 31 U.T.L.J. 153. On the other hand, there can be little doubt that direct employee picketing of a geographically removed secondary employer's premises is not protected by section 76(2) subject possibly to considerations of a roving primary situs or ally considerations. See *Wescraft Manufacturing Ltd.*, [1975] 2 Can. LRBR 324 and Paterson, *Union Secondary Conduct: A Comparative Study of the American and Ontario Positions*, (1973), 8 U.B.C. Law



Rev. 77 at 81. While it may be that a clearly secondary and uninvolved employer can come before this Board for a direction to require his employees to cross the picket lines, such a remedy is not always entirely adequate particularly in relation to suppliers and others and we see little justification for placing the employees of a secondary employer in the dilemma of choosing between their loyalty to the labour movement and their legal obligations. Section 76 was designed to remove the source of the problem, i.e. employee directed secondary picketing. See Arthurs, *Labour Law-Secondary Picketing-Per Se Illegality-Public Policy* (1963), 41 Can. Bar Rev. 573 at 584. It is only since the expansion of the Board's remedial authority that the problem has become one falling within the Board's responsibility. In this respect, we think the reliance of *Canteen of Canada Ltd. in Ford Motor Co. of Canada Ltd. v. Browning* (1978), 86 D.L.R. (3d) 579 at 581 was understandable but not warranted. Accordingly, *Canteen of Canada* must be read in light of the instant decision.

11. Moreover, in the context of province-wide bargaining in the construction industry we are reluctant to hold that contractors working on a common construction site but otherwise unrelated to a dispute involving another trade also located there lose the protection provided for by sections 74 and 76(1). Nor, with the advent of province-wide bargaining, do we accept that section 76(2) permits unrestricted picketing directed at employees of employers unconnected with the labour relations dispute other than by geography provided that separate entrances can be established for such employees and provided further that the work of the striking trade or trades is not being performed. In embarking in this direction the Board must be sensitive to the custom and practices of trade unions and to the psychology permeating labour relations conflict. However, we see little justification for unrestricted common situs picketing in province-wide bargaining where the work of the striking employees is not being performed and the employers adversely affected are not connected with the negotiations. Such employers are not party to the negotiations and can have no real control on bargaining postures. Picketing directed at such employees and employers is in every sense secondary and not connected with a lawful strike. Indeed, we note that Hamilton and Toronto locals do not see a need to picket other craft employees even of multi-trade contractors unless their work is being performed.. Thus, in the circumstances of this case, and where the picketing, either physically or visually, was not limited to single trade mechanical contractors and the common employer multi-trade contractors, we find and declare that the officers of the respondent trade union intended to cause an unlawful strike of trades employees employed by employers who are not part of the mechanical trades negotiations and that, to the extent that the picketing is directed at and interfering with such employees, the picketing cannot be said to be in connection with a lawful strike. However, on the very limited facts before us, we are not prepared to say that the multi-trade contractors involved in bargaining with the employee bargaining agency of the respondent local may also seek protection under sections 74 and 76(1). While there may be additional detail and argument on how the construction industry is different than a normal industrial setting where various employee groups of a single employer are employed in proximity to each other and therefore properly subjected to picketing, we are not prepared to distinguish the construction industry in this respect at this time. This case should not be taken as a signal to parties outside the ambit of province-wide construction industry negotiations to begin establishing reserved gates in an effort to insulate themselves from primary picketing. This decision is very much centered on the needs and practices of a particular segment of the construction industry. Finally, because of the somewhat unprecedented nature of this application, we view our findings as speaking to the future and no other relief is justified for what has occurred to date.

12. Having regard to all of the foregoing, the Board makes the following order:

1. The Board, subject to paragraphs 2, 3 and 4, directs and orders that the officers, officials or agents of the respondent, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663, and any other person having notice or knowledge of this direction and order, cease and desist from establishing or maintaining a picket line, picketing or doing any other act which they know or ought to know, as a reasonable consequence of such act, other persons will engage in an unlawful strike at construction projects in the ICI sector of the construction industry in the County of Lambton at which employers for whose employees the respondent holds bargaining rights are working or have worked within the previous six months, save and except at the entrances to the construction projects for employees of such employers until a provincial agreement binding upon the applicant and respondent is entered into or until such further orders or directions, if any, are made by the Board.
2. Paragraph 1 of this direction and order shall not apply to a construction project until one entrance to the project is established for employees of employers whose employees are represented by the respondent and another entrance to the project is established for all other employees employed by other contractors.
3. Paragraph 1 of this direction and order shall not apply to a construction project on which work performed by members of the respondent prior to the strike is being performed.
4. Paragraph 1 of this direction and order shall not apply to a construction project where access has been refused to a designated official of the respondent for the purpose of determining whether any of the work performed by members of the respondent prior to the strike is being performed.

13. The Board retains jurisdiction to deal with any differences between the parties arising out of the interpretation of this order and direction.

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**2291-81-R** Utility Workers of Canada, Applicant, v. **The Public Utilities Commission of the Borough of Scarborough**, Respondent, v. International Brotherhood of Electrical Workers, Local 636, Intervener, v. Group of Employees, Objectors

**Bargaining Unit – Practice and Procedure – Pre-Hearing Vote – Incumbent craft union displaced by non-craft union in pre-hearing vote – Whether employees having status to make submissions – Whether craft employees entitled to be excluded from certificate and continue to be represented by incumbent – Whether advantages of being represented by craft union relevant factor**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

***APPEARANCES:** Alick Ryder Q.C. and Gary Rainthorpe for the applicant; William Hutchison for the respondent; B. Fishbein, S. Tatrallway, W. Moore and L. Barr for the intervener; Brian P. Bellmore, Douglas J. Simpson and Cyril DaSilva for the objectors.*

**DECISION OF THE BOARD;** June 25, 1982

1. By decision dated February 22, 1982 in this application for certification, the Board, differently constituted, directed that a pre-hearing representation vote be taken of the employees of the respondent in the voting constituency described in that decision, that the ballot box be sealed pending further instructions from the Board, and that the matter be listed for hearing on the earliest possible date following the pre-hearing representation vote, for the purpose of allowing the applicant an opportunity to prove its status as a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Following that hearing, another panel of the Board chaired by the present Vice-Chairman found the applicant to be a trade union within the meaning of section 1(1)(p) of the Act, in a decision dated April 21, 1982. Since allegations of misrepresentation and conditional payment had been filed with the Board by the intervener, the Registrar was directed to list the matter for continuation of hearing. However, counsel for the intervener subsequently withdrew all of those allegations and requested that the ballot box be unsealed and that the ballots be counted. Accordingly, the ballots cast in the pre-hearing representation vote were counted on May 21, 1982.

2. Following the counting of the ballots, the following statement of desire, addressed to the Minister of Labour, was filed with the Board within the time fixed under subsection 3 of section 70 of the Board's Rules of Procedure:

"In accordance with paragraphs 2 and 3 of the report of the returning officer concerning the counting of the ballots at the Public Utilities Commission of the Borough of Scarborough, File No. 2291-81-R, we the skilled tradespeople wish to make the following statement:

The official and final counting of the ballots in no way truly represents the position of the workers at Scarborough Public Utilities Commission. The skilled tradespeople and affiliated workers (The Journeymen in Line Maintenance, Construction and Substations, Apprentices, Groundsmen and Truck Driver-Helpers) are fully in support of the International



Brotherhood of Electrical Workers, and being in the minority have found ourselves carried along by the general vote of other unaffiliated workers and find untenable the present position of being represented by the Utility Workers of Canada.

Taking note of the deadline of May 31, 1982 and while still represented by the International Brotherhood of Electrical Workers, we wish to make the following request:

We find from Section 6, subsection 3, page 6 of the Labour Relations Act, that the possibility exists of carving out the skilled tradespeople and affiliated workers as a separate bargaining unit to be represented by the International Brotherhood of Electrical Workers, and accordingly, we request that another vote be taken with a list of the employees concerned, that could be supplied from the Personnel Office. We feel that such a vote would more truly, and democratically reflect the situation at Scarborough Public Utilities Commission. Attached is a petition from the members concerned.

We feel for the betterment and morale of *all* employees of the Commission that your intervention in this matter is very much needed, and will be greatly appreciated.

Respectfully

(signed) Cyril DaSilva  
Unit Chairman"

The petition which accompanied that statement of desire bears the signatures of 54 employees in the classifications referred to in the second paragraph of that statement of desire.

3. A hearing was held by the Board on June 18, 1982 for the purpose of hearing the evidence and representations of the parties with respect to the bargaining unit (and with respect to all other matters arising out of and incidental to this application). Although counsel for the applicant questioned the status of the objectors to make submissions to the Board with respect to the description of the bargaining unit, the Board ruled that it would permit the objectors to present evidence and argument with respect to that matter. (A similar opportunity was extended to each of the other parties.) In a certification application in which the applicant does not request a pre-hearing vote, the Form 6 Notice to Employees of Application for Certification and of Hearing (posted by the employer in conspicuous locations of the work place) notifies employees of the application and also notifies them of the steps which must be taken if they wish to make representations to the Board. By way of contrast, the Form 7 Notice to Employees of Application and Request for Pre-Hearing Vote contains no similar instructions (although it does indicate that "[a]ny communication with respect to [the] application must be addressed to: The Registrar, Ontario Labour Relations Board 400 University Avenue, Toronto, Ontario M7A 1V4). This is not surprising in view of the purpose of the pre-hearing representation vote procedure, which was described by the Board as follows in *Emery Industries Limited*, [1980] OLRB Rep. March 316, at paragraph 5:

"The purpose of the pre-hearing, or 'quick vote' procedure is to facilitate a prompt resolution of representation questions, by permitting the Board

to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that *all of the parties* will be given a full opportunity to make their submissions with respect to any matters in dispute.”

(emphasis added)

(See also *Groves Park Lodge*, [1981] OLRB Rep. Nov. 1581.) In the context of a certification application in which the Board directs that a pre-hearing vote be taken, it is only when the Notice of Report of Returning Officer (in Form 71, 72 or 73, as the case may be) has been posted on the employer's premises that the employees are informed of the procedure for sending to the Board a statement of desire to make representations “in connection with the application”, “as to any matter relating to the representation vote”, “as to the accuracy of the report”, or “as to the conclusions the Board should reach in view of the report”. Thus, the pre-hearing vote procedure does not preclude a bargaining unit employee, or a group of bargaining unit employees, from making submissions to the Board with respect to such matters as description of the bargaining unit; it merely defers the appropriate time for making such submissions, thereby permitting the representation vote to be taken as expeditiously as possible.

4. The intervener was certified as bargaining agent for the respondent's Hydro Division employees in the later 1940's and entered into its first collective agreement in respect of that bargaining unit about 1952. In the late 1950's or early 1960's, the intervener obtained a certificate for the respondent's Water Works Division and subsequently entered into a separate collective agreement in respect of that unit. However, after the expiry of the initial Water Works Division collective agreement, the intervener and the respondent agreed to enter into a single collective agreement which covered both the Hydro Division and the Water Works Division. In the early 1960's, the employees in the respondent's Garage Division also came to be covered by the “amalgamated” collective agreement between the intervener and the respondent. Thus, although the intervener originally held separate bargaining rights for the respondent's Hydro Division employees, the employees in that division have been included in a common “outside” bargaining unit along with the employees in the respondent's Water Works Division and Garage Division for approximately twenty years, through a series of collective agreements. Despite that substantial history of successful collective bargaining, the objectors now seek to have the Board split the existing bargaining unit by certifying the applicant for a bargaining unit which excludes journeymen in line maintenance, construction and substations, apprentices, groundsmen and truck driver-helpers. The effect of such exclusions would be to permit the Hydro Division employees in those classifications to retain the intervener as their bargaining agent. (For ease of reference, the employees in those classifications will be referred to in this decision as the employees in the “residual unit”).

5. In support of his clients' request, counsel for the objectors noted that the Board is not required by the Act to determine the unit of employees that is *most* appropriate for collective bargaining; it is only required by section 6(1) to “determine the unit of employees that is appropriate for collective bargaining”. He also submitted that if the Board has any doubt concerning the true wishes of the employees in question, it should conduct a vote of the

employees in those classifications for the purpose of ascertaining their wishes as to the appropriateness of the unit (as permitted by section 6(1) of the Act).

6. In support of their position, the objectors adduced evidence which indicates that linemen in the residual unit undergo an extensive apprenticeship training programme before attaining journeyman status, which has no equivalent in the Water Works Division. In addition to their more rigorous training requirements, the residual unit employees have separate supervisors, perform different work which requires unique safety precautions, and are to some extent functionally independent of the other employees in the bargaining unit. However, employees from the Hydro Division sometimes work in the Water Works Division during periods of temporary manpower shortages, and vice versa. Also, a few permanent transfers have occurred from the Water Works Division to apprenticeship positions in the Hydro Division pursuant to the job posting procedures contained in the collective agreement.

7. Although there is some justification for the contention of the employees in the residual unit that they share a community of interest distinct from that of the other "outside employees", there are also a number of countervailing considerations. Foremost among these is the fact that the existing "outside" bargaining unit has proved to be quite appropriate for collective bargaining, as evidenced by a series of collective agreements spanning two decades. That comprehensive bargaining structure, which the objectors seek to fragment, was agreed to by the very bargaining agent which the objectors now seek to retain in the context of a much smaller unit. There is no evidence that the objectors have suffered any prejudice as a result of their longstanding inclusion in the existing comprehensive unit of "outside workers" in the employ of the respondent. Indeed, it was conceded that there was no concern whatever about their inclusion in that unit until the applicant commenced its organizational activities.

8. It is clear from the evidence that the objectors' real concern is not the breadth or scope of the existing bargaining unit, but rather the identity of the trade union that has won a displacement vote in respect of bargaining rights for that unit. As stated by counsel for the objectors, although his clients "were content to have a 'craft union', the I.B.E.W., representing them, and acquiesced in that for a number of years, it's another matter altogether when [they're] confronted by a 'non-craft' union representing [them] plus others". In his testimony before the Board, Mr. DaSilva expressed several concerns on behalf of the objectors with respect to the potential loss of the intervener as their bargaining agent. One of those concerns was the applicant's "lack of affiliation with an electrical trades union". Mr. DaSilva expressed the view that if the residual unit employees went on strike while represented by the applicant, there would be nothing to prevent linemen and other members of the I.B.E.W. from crossing the picket line and performing the struck work. He also gave evidence concerning the intervener's extensive involvement in various electrical safety programmes and activities. That evidence was confirmed by the testimony of William Moore, an experienced International Representative in the employ of the intervener, as was Mr. DaSilva's evidence concerning the extensive employment opportunities in Canada and the United States that are available to members of the intervener.

9. Although the concerns raised by the objectors about the respective resources, expertise and connections of the applicant and the intervener in respect of matters such as affiliation, safety, and employment opportunities, are clearly issues which are quite properly the subject of discussion among employees, "electioneering", and other activities which precede a displacement representation vote, they are not factors which the Board finds to be persuasive in determining the appropriate bargaining unit in the circumstances of this case.



10. It was common ground among the parties that the International Brotherhood of Electrical Workers is a “craft” union within the purview of section 6(3) of the Act in some contexts, including the construction industry and various other industries such as paper mills and shipyards. However, the Board is not satisfied on the evidence before it that the requirements of section 6(3) have been met in the present case. In particular, it has not been established on the balance of probabilities that journeymen in line maintenance, construction and substations, apprentices, groundsmen and truck driver-helpers “commonly bargain separately and apart from other employees” in the context of municipal utilities. (Although Mr. Moore testified that “hydro” employees bargain separately from “water” employees in some municipalities, he also stated that they are combined in a single bargaining unit in other municipalities. It also appears from Mr. Moore’s evidence that separate bargaining rights for “water” and “hydro” employees in a number of municipalities flow not from any bargaining unit determinations by this Board or bargaining unit agreements between unions and employers, but rather from the fact that many “water” employees are employed by the municipalities themselves, while “hydro” employees are employed by separate corporate entities which provide electrical power services to various municipalities.) Thus, it is unnecessary for the Board to determine whether the other requirements of section 6(3) have been fulfilled in the circumstances of this case.

11. It is also important to note that the residual unit in respect of which the objectors seek to retain representation by the intervener, does not include all of the employees in the respondent’s Hydro Division. If the Board were to accede to the wishes of the objectors, journeymen in line maintenance, construction and substations, apprentices, groundsmen and truck driver-helpers would form one bargaining unit (represented by the intervener), but a number of the respondent’s Hydro readers, general servicemen, inspectors, stockkeepers, labourers and construction clerks, would be included in another bargaining unit (represented by the applicant). The Board was presented with no collective agreements, certificates or other evidence indicating that a residual unit of the type advocated by the objectors has ever been found by this Board, by any other labour relations tribunal, or by any parties to a collective agreement, to be appropriate for collective bargaining in either a “craft” or non-craft context.

12. Counsel for the intervener made submissions before the Board in support of the objectors’ position notwithstanding the fact that the intervener had not questioned the appropriateness of the existing bargaining unit in its reply to this application, in any statement of desire filed with the Board, in its submissions to the Board Officer at the pre-hearing vote meeting, or at any time during the course of collective bargaining with the respondent. The respondent’s representative provided the Board with a brief historical outline of the intervener’s bargaining rights, but elected to maintain a position of neutrality by making no submissions to the Board with respect to the merits of the dispute among the other parties concerning the description of the bargaining unit.

13. This is not the first time that the Board has been met with a request that employees in certain classifications be excluded from a certificate issued by the Board in a displacement application. In *The Wellesley Hospital*, [1976] OLRB Rep. Feb. 45, the Canadian Union of Public Employees sought to displace a local of the International Union of Operating Engineers as bargaining agent for a unit consisting of stationary engineers, hospital equipment maintenance men and helpers. After the applicant had won a pre-hearing representation vote by a majority of one vote (nine of the seventeen ballots cast were cast in favour of the applicant), the employer and the Service Employees Union submitted that the hospital equipment maintenance men and helpers did not share a community of interest with the

remaining employees in the incumbent's bargaining unit; it was suggested that they shared a community of interest with the employees encompassed in the "service" bargaining unit for which the Service Employees Union held bargaining rights. Thus, that union and the respondent sought to have the applicant's bargaining unit confined to "stationary engineers". In rejecting that request, the Board wrote:

"5. The general principle to be applied in 'displacement situations' was stated by the Board in the *Electrohome Limited* case OLRB M.R. December, 1967, p. 854, at page 857, as follows:

'On an application for certification where the applicant union seeks to displace an incumbent union, the very least such applicant union is entitled to, if it wins the representation vote, is the same unit as was normally represented by the incumbent trade union.'

6. Although the resultant bargaining unit descriptions as ultimately determined by the Board, may differ from the wording as set out in the initial voting constituency (see the *Harding Carpets Limited* case (1975) OLRB Rep. 566), we would not, in any event, be prepared in the circumstances to 'carve-out' the unit in the manner as proposed to us by the Respondent and Intervener #, especially where, as in the instant case, it would appear that the parties to the relevant collective agreement have been content to 'live' with such a unit description for some thirty years...."

See also *Ontario Hydro*, [1980] OLRB Rep. June 882, at paragraph 22 in which the Board observed:

"...Where parties have established the viability of a bargaining unit through actual bargaining and where the history of such bargaining has been relatively satisfactory, this Board ought not to encourage fragmentation. Moreover, in these cases, the Board is not dealing with employees who are unrepresented by a trade union. Thus, more concern can be given to the most viable unit from a collective bargaining viewpoint without the risk of impeding the initial organization of employees attempting to engage in bargaining...."

In that case, the applicant sought to carve a group of employees out of an existing province-wide unit represented by the incumbent. In response to that application, the incumbent contended that the existing province-wide unit was the only appropriate unit. Although the Board confirmed that there is "a strong presumption in favour of the incumbent trade union's bargaining unit", it also expressed a willingness to entertain evidence as to why the status quo ought not to be maintained. In that decision, the Board indicated that a clear failure by the incumbent trade union to adequately represent a distinct and cohesive group which meets the principles of appropriateness generally applied to certification cases, combined with a capacity in the employer to tolerate somewhat greater fragmentation, might prompt the Board to permit such a "carve out". (Similar considerations are also relevant in determining whether it is appropriate to permit a craft unit to be carved out of a broader bargaining unit: see, for example, *Villacentres Management Ltd.*, [1979] OLRB Rep. April 359.)

14. As stated by the Board in *Ontario Hydro, supra*, at paragraph 26, this Board has a legitimate interest “in encouraging broader based collective bargaining structures which maximize opportunities and flexibility for both employers and employees”. In situations involving employees who are unrepresented by a trade union, the Board must have due regard to the labour relations reality that requiring a trade union to organize a highly comprehensive unit may effectively impede the access of all of the employees within that unit to any collective bargaining at all. (See *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, and the review of the Board’s jurisprudence contained in that decision.) However, in displacement situations such as the instant case in which the Board is not dealing with employees who are unrepresented by a trade union, greater emphasis can properly be placed upon the desirability of maintaining existing broadly based collective bargaining structure that have evolved over the years and have proven to be viable and sound.

15. Having regard to all of the evidence, the submissions of the parties and the Board’s jurisprudence with respect to displacement applications, the Board is of the view that the intervener’s bargaining unit is the appropriate bargaining unit in the circumstances of this case. The success of the intervener and the respondent in negotiating collective agreements over a period of approximately twenty years vividly demonstrates the appropriateness of that unit for purposes of collective bargaining. Acceding to the objectors’ request would result in unnecessary fragmentation and might also give rise to jurisdictional disputes. The applicant has won a pre-hearing representation vote in the incumbent’s bargaining unit. While a minority of the employees in that unit are dissatisfied with the result of the vote, such dissatisfaction is inherent in the democratic process and does not provide a rationale for fragmenting an existing bargaining structure that has withstood the test of time. The present case is not a situation in which the applicant seeks to “carve out” from the incumbent’s bargaining unit a smaller unit consisting of a distinct and cohesive group which the incumbent has failed to represent adequately. Rather, it is a situation in which some dissentient employees seek to be, in effect, “carved out” into a smaller bargaining unit for which the incumbent will retain bargaining rights. It is apparent that the objectors’ request is primarily based upon a concern that the applicant will not be able to adequately represent the employees in the classifications in question. However, that concern is premature; it is based upon sheer speculation that has arisen before the applicant has had any opportunity to demonstrate its ability carry out the statutory duties and obligations that accompany certification by this Board. Should the actual representation of those classifications by the applicant prove to be seriously inadequate, a “carve out” application could be filed for consideration by the Board at an appropriate time in the future. Moreover, the applicant’s obligations under section 68 of the Act also provide an element of protection for minority interests. That section provides that a trade union, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the bargaining unit, whether or not members of the trade union.

16. The evidence before us indicates that the employees whom the objectors seek to have excluded from the unit do have a community of interest which, at least in some respects, is separate from the other employees in the existing bargaining unit. If this were a fresh situation in which no established patterns of collective bargaining had been established, the Board might be somewhat more disposed to grant a separate bargaining unit to such employees, although even in such fresh situation the Board’s aversion to bargaining unit fragmentation might well dissuade it from issuing a certificate which covered only some of the



“outside” employees in the respondent’s Hydro Division. (See, for example, *Tamco Limited*, [1974] OLRB Rep. Nov. 764, in which the Board refused to find appropriate an “all employee” (production) bargaining unit from which skilled tradesmen, their apprentices and set up men were to be excluded, despite the fact that the trade union, the employer and the objectors had all agreed to that exclusion.) Be that as it may, in view of all the circumstances, including the lengthy history of successful collective bargaining in relation to the existing unit and the absence of any evidence that would permit the Board to conclude that the employees in question are unlikely to continue to obtain proper representation within the existing bargaining structure, the Board is satisfied that it is in the best interests of sound labour relations to maintain the integrity of that unit in the circumstances of this case. For the foregoing reasons the Board, in the exercise of its discretion under section 6(1) of the *Labour Relations Act*, hereby determines that all employees of the respondent in its Hydro Division, Water Works Division and Garage Division in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. For the purposes of clarity, the Board notes the agreement of the applicant and the respondent that the following classifications are included in the bargaining unit:

*(List of classifications omitted)*

18. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

19. As indicated above, on the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

20. A certificate will issue to the applicant.

21. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**0077-82-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, Applicant, v. Schenker Warehousing a Division of Schenker of Canada Limited, Respondent v. Group of Employees, Objectors**

**Certification – Petition – Management indicating loss of existing benefits if union successful – Lead hand warning of layoffs – One person circulating petition close friend of manager and having supervisory function – Board not accepting petition as voluntary**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

**APPEARANCES:** *John McNamee and D. McDermott for the applicant; Don Robinson and Otto Hrboticky for the respondent; Hart M. Rossman, Q.C., Robin Dimmick, James Quinn and Keith Cooney for the group of employees.*

**DECISION OF VICE-CHAIRMAN, IAN SPRINGATE AND BOARD MEMBER S. COOKE; June 10, 1982**

1. This is an application for certification.

• • •

6. On the date of the making of the application there were 76 employees in the bargaining unit. The applicant filed evidence of membership on behalf of 51 of these employees. The evidence of membership consists of applications for membership, with attached receipts indicating a payment of \$1.00 to the union. This evidence of membership is supported by a duly completed Form 9, Declaration Concerning Membership Documents. Having regard to this material, and to the definition of a “member” of a trade union set out in section 1(1)(L) of the Act, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 22, 1982, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. There was also filed with the Board a statement of desire in opposition to the application signed by 61 of the respondent’s employees. Statements of desire are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section 1(1)(L), nor is there any requirement for a monetary payment (in the nature of consideration confirming the act of signing), or a declaration of regularity similar to Form 9. Nevertheless, the existence of statements of desire appears to be contemplated by both section 103(1)(j) of the Act and Rule 48 of the Rules of Practice; and in any event, the Board has a long established practice of accepting statements of desire and exercising its discretion under section 7(2) of the Act to order a representation vote where: the statements are voluntary, there is evidence given in accordance with Rule 48, and the statements contain the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union’s members continue to support its certification.

8. In the instant case, 38 of the 61 employees who signed the statement of desire in opposition to the application, had previously signed union membership cards indicating that they supported the union's certification. If we were satisfied that the union members who signed the statement of desire did so voluntarily, we would have before us two contradictory pieces of documentary evidence concerning the employees' wishes and would, in accordance with the Board's usual practice, exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote to resolve the issue.

9. Before the Board will direct the taking of a representation vote on the basis of an employee statement of desire, it must be satisfied that when union members signed the document evidencing an apparent change of heart, they did so voluntarily. Often, as in the present case, a statement of desire in opposition to a trade union's certification will be signed by employees who have indicated their support for the trade union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a statement opposing the union. Frequently, such documents are circulated by employees who, in their opposition to the union, will be objectively aligned in interest with the employer. In these circumstances, an employee may sign a statement of desire because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign a statement of desire because of suggestions that his continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case could one regard his signing of the statement of desire as truly voluntary, for in both cases it would result from a perceived threat to his job security.

10. Three employees testified with respect to the statement of desire, namely Mr. R. Dimmick, Mr. J. Quinn and Mr. K. Cooney. In giving their testimony, they referred to a number of managerial persons, some of whose positions they were not entirely certain of. No one in management was called to testify. Accordingly, the titles of certain of the managerial persons referred to below may be somewhat inaccurate. It is also possible that the names of these managerial persons may have been inadvertently misspelled.

11. The applicant filed its application for certification on April 13, 1982. However, it is clear that the respondent's management was aware of its organizing campaign prior to that date. Indeed, at a meeting between management and an employee committee held on or about April 8, 1982, Mr. Otto Hrboticky, the acting manager at the respondent's plant, asked why employees wanted a union, and also requested that employees hold off on the union in that Mr. Muller, the respondent's president, and Mr. Postuma, its comptroller, would soon be in town to make some proposals. Mr. Hrboticky added, however, that if employees wanted a union that was their right.

12. On Thursday, April 15, 1982, at about 9:15 a.m. management called a meeting of all the employees who were at work at the time. Attending on behalf of the respondent were Mr. Hrboticky, Mr. Muller, Mr. Postuma and Mr. Bribeck, whose title was not referred to at the hearing. Mr. Dimmick testified that someone from management stated at the meeting that the union had asked to have a representative present, but that the respondent had turned down the request since management wanted to hear why the employees thought it necessary to have a union. According to Mr. Dimmick, Mr. Postuma indicated that once the union came in some of the benefits currently enjoyed by the employees would not be guaranteed, and that the Christmas bonus would not be continued. The bonus has been paid to employees every year



for the past few years, and has varied between \$150.00 and \$1,000.00 depending upon an employee's length of service. Mr. Dimmick also testified that the respondent indicated that it wanted employees to hold off with the union since it had some proposals for the employee committee although it could not announce what they would be.

13. On April 15th, after the meeting referred to above, Mr. Dimmick asked Mr. Hrboticky for assistance in opposing the union. Mr. Dimmick testified that Mr. Hrboticky indicated that he could not assist him, but that he did show him a letter from the respondent's lawyer which listed the names of six lawyers. One of these lawyers was subsequently retained by the group of objecting employees to assist them with respect to the statement of desire.

14. The statement of desire was circulated by Mr. Cooney, Mr. Dimmick and Mr. Quinn. Mr. Cooney is a "bond Keeper", one of the respondent's most senior employees. Mr. Cooney testified that it is common knowledge that he is a friend of Mr. Hrboticky. Mr. Dimmick and Mr. Quinn are both lead hands, and at one point Mr. Quinn had been employed as a foreman. Although as lead hands Mr. Dimmick and Mr. Quinn do perform some of the same work as other employees, they spend a majority of their time supervising and assigning work to other employees and taking care of administrative details. Mr. Quinn supervises eleven employees, Mr. Dimmick fifteen. Neither gentlemen can discipline employees although they both make reports about employees to foremen. It appears that no foremen are in the plant during the evening shift, and accordingly, at times there is no one present who is more senior than Mr. Dimmick or Mr. Quinn.

15. The statement of desire filed in this matter was not the first such statement or "petition" to be circulated. On April 15th, the day of the meeting called by management, Mr. Quinn drafted a document in opposition to the applicant. The document was typed by "Donna" who takes calls for the foreman and who, in Mr. Quinn's words acts "in a limited scope" as the foremen's secretary. According to Mr. Dimmick, Mr. Quinn circulated this petition on the evening shift on April 15th, at a time when no one more senior to him was in the plant. Mr. Quinn testified that on April 15th he left the document under the desk blotter of Mr. Terry Craft, a foreman, and that as far as he knew it remained there until Saturday, April 17th, when he believed Mr. Dimmick removed it.

16. The document filed with the Board appears to have started to be circulated on April 19th during the evening shift after Mr. Dimmick had made a general announcement to the employees he supervised that he had a document against the union which they could sign in the shipping office. According to Mr. Dimmick, at this time a number of employees asked him questions, including questions about possible lay-offs. Earlier, a fork-lift operator, Mr. Dave Favro, had gone around the plant telling employees that Inglis, one of the respondent's largest customers, had withdrawn some of its business due to the union and would withdraw all of its business if the union came in. For about an hour on April 17th Mr. Conney had accompanied Mr. Favro as he went about spreading this message to employees. As it happens, on April 16th, Inglis had in fact discontinued one of the respondent's lines.

17. The employees signed the statement of desire in the shipping office as well as at various locations both in and away from the respondent's premises. No employees signed in the presence of management. In cross-examination, Mr. Dimmick indicated that while obtaining signatures he advised some employees that if the union "got in" there would probably be lay-offs.

18. Given the facts set out above, we are not satisfied that when the employees who had previously signed union membership cards, signed the statement of desire, they were expressing a genuine and voluntary change of heart. The employees signed the document after management had indicated that employees stood to lose existing benefits if the union was certified to represent them. Further, a lead hand had advised employees that lay-offs were likely to occur if the union got in and another employee, accompanied for a while by Mr. Cooney, had indicated that a major customer would withdraw its business if the applicant were certified. Two of the three persons circulating the document were lead hands who at times were the most senior people in the plant, and the third, Mr. Cooney, was known to be a friend of Mr. Hrboticky. A similar document circulated earlier by one of the two lead hands had been typed by the foremen's secretary and left on a foremen's desk. In these circumstances, employees may well have signed the statement of desire out of a reasonable concern that the applicant's certification would result in a loss of benefits and lay-offs as well as a concern that through the lead hands and Mr. Cooney, management would come to know which employees had refused to sign the document. In these circumstances, we decline to exercise our discretion to direct the taking of a representation vote.

19. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. The majority decision sets out the, by now, well known rationale employed by the Board in divining the state of mind of employees to be affected by its decisions.

2. My concerns over the practice of eschewing the use of a secret ballot in preference to other indicia of employees wishes are perhaps equally well known and need not be repeated here. I do, however, express particular concern over two points:

a) the unquestioning assumption that an employee's support for a trade union is necessarily held more confidentially than opposition to a trade union as well as the notion that the revelation of this information is of such consummate importance, and

b) the notion that persons included in the prospective bargaining unit but with social or other ties to a member of supervision, should be precluded from giving full expression to any views they may have at the risk of their comments proving fatal to a statement of desire.

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**0440-82-U; 0441-82-U; 0442-82-U** Mechanical Contractors Association Ontario, Applicant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, **Sikora Mechanical Ltd.**, and Adam Clark Co. Ltd., Respondents; Mechanical Contractors Association Ontario: Mechanical Contractors Association — Zone 7 — Kitchener, Applicant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527; J. Porter, Respondents; Mechanical Contractors Association Ontario, Applicant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and W. A. Stephenson Construction Co. Ltd., Respondents

Collective Agreement – Construction Industry – Strike – Whether supply of employees for projects during province-wide strike contrary to section 148(1) – Whether unlawful selective strike – Whether continuing duty to make reasonable efforts to ensure all employees participate in strike – Whether local parties having right to sign interim or extension agreements in ICI sector – Whether “National Agreement” null and void as contrary to section 146(2)

**BEFORE:** George W. Adams, Q.C., Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *R. A. Werry and J. McCarron for the applicants; Stanley Simpson and J. Porter for the respondents United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527; J. Porter; Philip J. Wolfenden and Bruce Walker for the respondent Adam Clark Co. Ltd.; L. C. Arnold and W. Howard for the respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Brian P. Smeenck and R. Sikora for the respondent Sikora Mechanical Ltd.; no one appearing for the respondents United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and W. A. Stephenson Construction Co. Ltd.*

#### **DECISION OF THE BOARD; June 14, 1982**

1. All three files involve similar problems and request relief under sections 135 and 89 of the *Labour Relations Act*. The three matters were consolidated and heard as one.
2. The applicant, Mechanical Contractors Association Ontario, is a designated employer bargaining agent representing employers whose employees in the industrial, commercial and institutional sector of the construction industry are presented by the respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as “the United



Association and its locals including the respondents Local 46 and Local 527. The applicant is currently engaged in collective bargaining for a province-wide industrial, commercial and institutional (hereinafter referred to as "ICI") agreement and on or about May 25th, 1982 a province-wide strike was called or authorized by the designated employee bargaining agent made up of the respondent United Association and the Ontario Pipe Trades Council. It is alleged that, notwithstanding the province-wide strike, the respondent Local 46 as an affiliated bargaining agent has continued to supply employees who work within the industrial, commercial and institutional sector to the respondents Sikora Mechanical Ltd. and Adam Clark Co. Ltd. contrary to section 146(2) and section 148(1) of the *Labour Relations Act*. It is alleged that the respondent Sikora Mechanical Ltd. is engaged in ICI construction at the Renaissance Hotel located at Kennedy Road and Highway 401 in Metropolitan Toronto. It is further alleged that the respondent Adam Clark Co. Ltd. is engaged in ICI construction at the Gulf Oil Refinery (Clarkson Refinery) located at Southdown Road and Highway 2 in Clarkson, Ontario.

3. The respondent Local 527 is also an affiliated bargaining agent of the employee bargaining agency for mechanical tradesmen and is subject to the terms of the designation issued to the aforementioned employee bargaining agency as is Local 46. The respondent J. Porter is the business manager of the respondent Local 527. It is alleged that Wm. Roberts Electrical and Mechanical Limited is the mechanical subcontractor on the Waterloo Motor Inn construction project located at 476 King Street North in Waterloo. Wm. Roberts Electrical and Mechanical Limited, it is alleged, was bound by the mechanical trades provincial agreement which expired on April 30th, 1982 and for which negotiations are underway for its renewal. It is further alleged that notwithstanding the province-wide strike desired by the employee bargaining agency and called and authorized by all its affiliated bargaining agents, the respondent J. Porter is continuing to supply members of Local 527 to Wm. Roberts Electrical and Mechanical Limited on the aforementioned construction project in violation of section 148(1) and section 146(2) of the *Labour Relations Act*.

4. The applicant alleges that the respondent W. A. Stephenson Construction Co. Ltd. works within the ICI sector and employs members of the respondent Local 46 and that the respondent company is covered by the terms of the provincial agreement expiring April 30th, 1982. The applicant submits that the respondent company is engaged in construction at the Lakeview Water Pollution Control Plant located at Highway 2 and Dixie Road, Mississauga, Ontario and that the work in question is within the ICI sector. It is further alleged that the respondent United Association and the respondent Local 46 are supplying men to the respondent company notwithstanding the calling and authorizing of a province-wide strike contrary to sections 146(2) and 148(1) of the Act.

5. The material provisions of the Act provide:

146.(1) An employee bargaining agency and an employer bargaining agency shall make one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer

bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

148.-(1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

(2) Where an employer bargaining agency desires to call or authorize a lawful lock-out, all employers it represents shall call or authorize the lock-out in respect of all employees employed by such employers and represented by all the affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(3) and no employer shall lock out such employees except in accordance with this subsection.

6. Bruce McBride, President of W. A. Stephenson Construction Co. Ltd., testified that the company has been a union contractor since the 1950's. The company obtains its employees from the respondent Local 46. It is currently involved in construction of the Lakeview Sewage Treatment Plant in Mississauga, Ontario and in employing 26 employees who are members of Local 46. The job has been in progress for 18 months and these employees have been working on it. McBride was aware of the province-wide strike and indeed his employees walked off the job on Tuesday, May 25th and Wednesday, May 26th, 1982 but returned to work on Friday, May 27th. He testified that he is paying the same rate to them now as under the expired provincial agreement and that prior to the expiry of this agreement on April 30th, 1982 the work in question was being performed under the mechanical trades provincial agreement. McBride testified that prior to the strike he spoke with Mr. Russ St. Eloi, Canadian Director of the United Association and asked him what the position of his company would be with respect to the "national agreement" at the Lakeview project. Eloi confirmed that the union would not be striking that project. On the commencement of the strike, McBride wrote to Local 46 indicating that his company was a "national agreement contractor" and that the national agreement provided for no strike or lock-outs during its term. He asked the union to advise when the men would be back to work. He further testified that his office received a telephone call from someone advising that the men would be back to work forthwith. The men reappeared the following day. There is a union steward for Local 46 currently working on the job. The "national agreement" was introduced into evidence and the last copy was signed in 1977. It provides for the company picking up the local United

Association agreement applicable to an area in which a project is being undertaken. However, since provincial bargaining, the company has "picked up" the provincial agreement for its ICI projects. The company operates exclusively in Ontario.

7. Reiner Sikora testified on behalf of Sikora Mechanical Limited. He is the president of the company and it is a unionized mechanical contractor. He has four jobs in the Metropolitan Toronto area and the one commercial project is the Renaissance Hotel at Highway 401 and Kennedy Road. He is in contractual relations with Wharton Enterprises Inc. (hereinafter referred to as "Wharton"), the owner and general contractor on the project. Sikora testified that the project is 60% unionized and that he was advised by Wharton that the owner's schedule of commitments would require the replacement of Sikora by a non-union company if Sikora could not complete the work. Sikora is four weeks behind because of picketing by other trades during the previous two months. Mr. Sikora was aware that a province-wide strike was in progress but testified that a number of his men who are members of Local 46 were continuing to work for him. He also testified that there was a union steward on the job. He testified that he employed 46 men prior to the strike and that all 46 men engaged in a strike on May 25th, May 26th and May 27th. However, after talking to his foreman about how the men might work during the strike, it was suggested to him to write a letter to Local 46 to seek permission to operate during the strike. Accordingly, by letter dated May 26th, 1982 he wrote to a business agent of Local 46, Mr. W. Howard. The letter reads:

U.A. Local 46,  
936 Warden Avenue,  
Scarborough, Ontario,  
M1L 4C9.

*Attention: Mr. W. Howard*  
Dear Sir:

Re: Renaissance Hotel Project — Kennedy Road and Sufferance

We would like to ask for permission to work on the above project during the strike.

The reason for our request is that the owner-builder is non-union and sub-lets contracts to non-union contractors.

We feel that he will protect his investment and look for other sources to complete his project. I do not have to point out the consequences it could have.

We would appreciate if you could grant our request. Hoping to hear from you about your decision.

Yours truly,

SIKORA MECHANICAL LIMITED



Mr. Sikora testified that he did not get a reply to this letter although 10 of his 28 men returned on the Friday, i.e. the day after he wrote his letter. He said he was paying the same wages as he had been paying before the strike in accord with the expired provincial collective agreement.

8. Bruce Walker is the project manager for Adam Clark Co. Ltd. (hereinafter referred to as "Adam Clark"). Adam Clark is a mechanical contractor which has several contracts with Gulf Canada Products Company at Clarkson, Ontario. Prior to the strike three of these jobs were employing United Association members from Local 46 under the provincial agreement. The job in question was commenced in early May with a completion date of Friday, June 4th, 1982. Seven employees who are members of Local 46 were employed on this job. Rick Walker is employed by Adam Clark and was the superintendent for this job. He spoke with Shawn O'Ryan, a business agent for Local 46 on the Friday prior to the strike and asked if there was a possibility that Adam Clark could complete the Gulf Canada job as Gulf Canada had requested. O'Ryan advised him that such was a possibility but that it had to be brought to the strike committee's attention in letter form. Accordingly, the following letter was sent to Mr. Howard, the Business Manager of Local 46 by Mr. Walker. He attached a letter to Adam Clark from Gulf Canada urging that the work be completed. This letter is also reproduced:

May 25, 1982  
Local 46  
Plumbers & Steamfitters Union  
936 Warden Avenue  
Scarborough, Ontario  
MIL 4C9

ATTENTION: Mr. W. Howard  
Business Manager

Gentlemen:

Adam Clark Company (1982) Inc. is in the midst of completing the instrumentation portion of shutdown work on the C.O. boiler at Gulf Canada Refinery at Clarkson.

This particular shutdown must be completed by June 4, 1982. If we, as Adam Clark, are unable to complete this work within this time frame, Gulf Canada will undertake to have it done by others.

This job consists of installing pneumatic tubing to certain particular instruments and control panels related to the operation of the C.O. boiler. This work is approximately 80% complete.

Our manpower on this particular job is six Local 46 workers. We, as Adam Clark, wish to meet our obligation to complete this instrumentation on schedule with Union trades people. We request Local 46 permission to proceed with this work as soon as possible.

Any questions related to this work may be directed to the writer at 822-4660, or to Mr. Arvo Vahtra of Gulf Canada at 822-4222.

Yours very truly,

ADAM CLARK COMPANY (1982) INC.

W. B. Walker  
Project Manager

May 25, 1982

Adam Clark Company Ltd.  
1605 Main St. West  
Hamilton, Ontario L8S 4L1

Attn.: Mr. Bruce Walker — Project Manager

Gentlemen:

Re: *Shutdown Work at the CO Boiler — AFE 2181 — P.O. 87978*

In regard to the above, we would like to draw your attention to the importance of completing your instrumentation and piping work on or before June 4, 1982.

For a safe and enviromentally acceptable refinery operation, the CO Boiler *must be* ready for startup on that date.

Please endeavour to comply with this urgent request.

Yours very truly,  
GULF CANADA PRODUCTS COMPANY,

J. R. Forsdike, P.Eng.  
Refinery Engineer

After sending these letters, Walker spoke to another business agent, Bruce Sneed, on Wednesday, May 26th, the second day of the strike and asked if any word had been received from the strike committee. Sneed replied that another official of the union, Bill Weatherup, was going down to the job site to research it more thoroughly before giving approval. Walker indicated that Weatherup attended the job site about noon that same day and following his attendance there Walker was advised by one of his employees that Adam Clark had permission to do the job and that it should start as soon as possible. Walker viewed the work as an emergency matter in that the manual operation of this particular boiler on which Adam Clark was working would cause considerable pollution to be emitted contrary to various

environmental laws and could be unsafe. It would appear that the refinery had been shut down for the period of the construction and that Gulf Canada had designated June 4th as the startup day. The work had been completed by the time of the hearing.

9. There was some suggestion that the work in question was maintenance. However, it was being performed under the terms of the mechanical trades provincial agreement or the extension of this provincial agreement prior to the strike and on further examination Walker admitted that Adam Clark was installing new instrumentation as well as altering old pneumatics. On the evidence before us, we are satisfied that it is ICI construction work. When questioned by Fred Whyte of the Mechanical Contractors Association in Hamilton about the work, Walker told him that Adam Clark had approached the union and had been given permission to work. The employees, all members of Local 46, were employed on the basis of the terms and conditions of employment of the expired provincial agreement.

10. Mr. B. D. Wilson, Mechanical Division Manager of Wm. Roberts Electrical and Mechanical Ltd. (hereinafter referred to as "Wm. Roberts"), testified that the company had eight projects in operation prior to the strike and covered by the mechanical trades provincial agreement. Some of these projects were in Toronto and others in the Kitchener area. He testified that none of the projects were proceeding at the moment. He testified that the company's contract for the mechanical work on the Waterloo Motor Hotel in Kitchener had been "lifted" on May 28th. That contract was three-quarters complete but the company had not received a signed copy of the contract from the owner, a Mr. Lawrence Bingeman of Freuer Homes. He testified that his employees had walked off the site on May 25th and remained off for the 25th, 26th and 27th and on the 28th he was advised that the company was no longer responsible for that contract. He said it was possible that the company might get the contract back after the strike. He said the general contractor asked him to man the project during the strike but he refused and made no suggestion how the general contractor might man it. However, the evidence reveals that three trailers of Wm. Roberts have been left on the site; that the trailers and tools appear to be being used; and Wilson testified that although aware of this possibility he had taken no steps to investigate the matter. Wilson testified that he did not know whether his company's tools were being used and whether rent or a service charge was being paid for the use of such tools. The employees employed by Wm Roberts are supplied by Local 527. Mr. Jack Porter is the Business Manager of Local 527. He testified that he had heard "a rumour" that the mechanical work was being done at the Waterloo Motor Hotel but that he did not know who was doing it. He apparently drives by the site each day. He further testified that he did not know whether the local's business agent, Tom Crystal, who reports to him and who is responsible for the ICI sector, had investigated the matter. He denied that Local 527 was supplying men to the site but he did not know whether Crystal had attended at the site to determine whether the men were Local 527 members and to instruct them not to work because of the province-wide strike. Local 527 has established a strike committee to monitor all jobs sites and establish picket lines where work is being performed by others. Porter testified that he was not aware of any request for a picket line at the Waterloo Motor Hotel.

11. Bud Fraser of the Mechanical Contractors Association in Kitchener testified that after finding the plumbers' trailer open at the Waterloo Motor Hotel building site he called Tom Crystal and asked why he had not pulled his men off the job. Crystal replied that he had made a deal with Mr. Bingeman that if he put union trades on the job the union guaranteed no trouble for the completion of the work. Crystal went on to say that he should be thanked for



getting the job to go union. Fraser testified that he was at the job site last Thursday and discovered the plumbers' trailer was being openly used together with tools and equipment. Bingeman ordered him off the property.

12. The provincial agreement for the mechanical trades expired on April 30th, 1982. A no-board report was issued on May 7th, 1982. The parties were in a legal strike and lockout position at 12:01 a.m. on May 21st, 1982. Because of the intervention of the long weekend no affect from the strike that was called was felt until May 25th, 1982.

13. On behalf of the applicant it was argued that in all these situations it had established "an arrangement" contrary to section 146(2) of the Act. Counsel submitted that a prima facie case of at least a tacit arrangement had been made out and all respondents had declined or failed to call evidence to rebut this prima facie case. It was further submitted that there was little doubt that all the contractors were working with United Association members and with the tacit approval of the trade unions contrary to section 148(1) in that they had a continuing duty "to call or authorize" a province-wide strike. It was submitted that the so-called national agreement to which W. A. Stephenson was a party was contrary to section 146(1) in the ICI sector in the province of Ontario and was therefore null and void. Moreover, the supply of men pursuant to this agreement was contrary to section 148(1). The applicant sought a declaration that the province-wide strike was unlawful. It also sought orders directing the contractors to cease and desist from working and the unions to cease and desist from supplying their members for the duration of the strike.

14. On behalf of Local 46 it was submitted that there was no evidence before the Board establishing an arrangement with that local trade union. It was submitted that with respect to the Lakeview Sewage Control Plant the evidence did not even demonstrate that the work fell within the ICI sector. While letters were sent by Sikora and Adam Clark to Local 46, counsel for Local 46 emphasized that there had been no written or oral arrangement. While the men might be working with the tacit approval of Local 46, such fell short of the agreement or arrangement required by section 146(2). Counsel submitted that it was clear on the evidence that a province-wide strike had been called or authorized by the affiliated bargaining agents and that there was nothing in the legislation to prevent employees from returning to work of their own volition. It was further submitted that where the Legislature intended to prevent the supply of men during a strike it would have done so specifically as in section 131(2) of the accreditation provisions. Not having been specific in the province-wide bargaining sections of the legislation, the Board was urged to presume that the Legislature did not intend to interfere with such activity. Finally, it was submitted that once an affiliated bargaining agent had called or authorized a strike there was no continuing obligation to see that the strike continued and that the Board could not properly read such an ongoing obligation into the section.

15. Counsel for Local 527 also submitted that the quiet acceptance by an affiliated bargaining agent that its members were working during a strike did not constitute an arrangement contrary to section 146(2) or section 148(1). He submitted that it was a contradiction in terms to say that men who were working were engaged in an unlawful strike. Counsel stressed that the evidence gave no hint of a selective strike to which, in his submission, section 148(1) was directed. All the situations described to the Board were isolated circumstances showing no province-wide pattern he submitted. Counsel pointed out that in the Kitchener area it had not been established that members of Local 527 were working on the Waterloo Motel job and that clearly there had been no arrangement between Wm. Roberts

and Local 527. Counsel objected to any reliance being placed on the conversation of Fraser with Crystal because Crystal had not been named as a respondent nor had particulars been given with respect to this point. However, we note that these latter objections were not taken at the outset of the hearing or as the evidence was received and for this reason cannot be accepted. That evidence is properly before us.

16. On behalf of Adam Clark it was submitted that the Legislature never intended black and white determinations under section 148. He suggested that there had to be exceptions made for situations of emergency or peculiar fact situations. It was submitted that it was not clear that the Adam Clark work for Gulf Canada was in the ICI sector; that the situation did not rise to the level of an arrangement contrary to section 146(2); and that there was no evidence suggesting an attempt to engage in a selective strike contrary to section 148(1). On behalf of Sikora Mechanical it was submitted that there was nothing in the Act to prevent an employer from attempting to operate during a strike; that section 146(2) dealt only with attempts to substitute an agreement for the provincial agreement in contrast to an interim arrangement pending the negotiation of a provincial agreement; and that there was nothing in the statute preventing individual employees from responding to an employer's request that they work. Counsel stressed that there was no evidence of a purposeful failing to supervise a strike on behalf of the various trade unions. Counsel for all respondents asked the Board to exercise its discretion under section 89 having regard to the isolated nature of the circumstances and the fact that the amount of work being done was small and in no way indicative of a selective work stoppage or a concerted attempt to avoid the consequences of the ICI negotiations.

17. In *Jen-Mar Construction Limited*, [1978] OLRB Rep. July 647 an employer subject to province-wide bargaining signed a document presented to him by a union officer of an affiliated bargaining agent agreeing to pay carpenters and carpenters' apprentices an extra 85 cents per hour pending the completion of negotiations of the carpenters' provincial agreement which at that time involved strike activity province-wide. Subsequent to the execution of this document, Jen-Mar's employees returned to work while the remainder of the carpenters in the ICI sector were out on a province-wide strike. The employer bargaining agency complained before the Board that this conduct contravened section 133(2) (now section 146(2)) of the Act, as being an "other arrangement". The Board agreed and stated at page 653:

Mr. Varty's conduct with respect to Jen-Mar and other employers in the Niagara Peninsula was an attempt to conclude another arrangement affecting employees represented by an affiliated bargaining agent, Local 38, other than a provincial agreement. The employer bargaining agency and the employee bargaining agency are in the process of endeavouring to conclude a province-wide collective agreement for carpenters and apprentice carpenters (other than millwrights) and Mr. Varty's conduct with respect to Jen-Mar has the effect of conferring a benefit on Jen-Mar which is not lawfully available to the employers who are represented in bargaining by the complainant. *Mr. Varty and Jen-Mar briefly created islands of privilege whereby Jen-Mar and certain members of Local 38 were insulated from economic loss which other employers and other employees were to suffer as a result of a lawful strike.* Such conduct by Mr. Varty and Jen-Mar is inherently destructive of the concept of province-wide bargaining. It causes disruption among the employers

who are represented by the complainant and may well cause similar disruption among the affiliated bargaining agents who are represented by the employee bargaining agency.

[our emphasis]

18. The Board went on to note in paragraph 16 that the form of the agreement or arrangement made no difference, its effect and prohibition by the Act was the same. It was argued before us that the supply of men by an affiliated bargaining agent during the course of provincial bargaining and a province-wide strike did not contravene any specific provision of the Act and that sections 146 and 148 were deficient in that where the Legislature had intended to preclude such union activity it did so specifically as in the accreditation provisions such as section 131(2). The respondents also placed reliance on the absence of a formal written agreement and any agreement to pay more than the expired provincial agreement as in the *Jen-Mar* case. However, we agree with the earlier holding of this Board in *Jen-Mar* at paragraph 17 that province-wide bargaining represents a far more complicated system of bargaining when compared to bargaining under a certificate of accreditation and that, in this context, the more general wording of section 146(2) constitutes a more comprehensive regulation of that process than was envisaged with respect to accreditation. In other words, given the importance of province-wide bargaining and the need for uniformity in the bargaining process, the use of more general language in section 146(2) could only have been intended to provide the Board with a much more broader mandate in dealing with all manner of activity that impairs the integrity of province-wide bargaining. An arrangement contrary to section 146(2) need not be written nor need it involve compensation over and above the provincial agreement.

19. It was also argued that the supply of men on terms and conditions of employment analogous to the expired provincial agreement was no different than an extension agreement typically employed in the collective bargaining negotiations and, as such, was not a device intended to replace or substitute for a provincial agreement contrary to the purpose of section 146. We disagree. Section 52(2) of the *Labour Relations Act* specifically provides for an agreement to continue the operation of a collective agreement or any of its provisions while parties are bargaining for its renewal. Such agreements clearly are a substitution for a collective agreement or a provincial agreement in the context of the ICI sector of the construction industry. Under section 143 of the Act, where an employer bargaining agency has been designated under section 139 as has the applicant in this case to represent a provincial unit of employers, the Act provides that all rights, duties and obligations under the Act of the employers for which the employer bargaining agency bargains shall vest in the agency but only for the purpose of conducting bargaining and concluding a provincial agreement. We understand this language to mean that the right to conclude an interim or extension agreement under section 52(2) vests with the employer bargaining agency as does the same right of an affiliated bargaining agent vest with the employee bargaining agency under section 142. Accordingly, local parties, employers and local trade unions, in the context of provincial bargaining in the ICI sector, lack the right to conclude interim or extension agreements unless approved or authorized by the respective employee and employer bargaining agencies. Where such unauthorized agreements are entered into, they are in breach of section 146(2).

20. Turning to section 148(1), it was submitted that once an affiliated bargaining agent calls or authorizes a strike pursuant to section 148(1) there is no continuing obligation to administer that strike by reasonable efforts to ensure that all affected employees participate in



it. We again disagree with this submission. A somewhat analogous or similar situation arises under collective agreements where trade unions promise that there shall be no strike during the term of a collective bargaining agreement. Many cases have had to deal with the trade union's obligation in relation to a "wild cat" strike which it has not called or authorized. Boards of arbitration have viewed no strike pledges as an implicit promise by the trade union that it will not, through its proper officers, sanction or direct or condone or encourage stoppages by any persons in the bargaining unit. See *Re Polymer Corporation and Oil and Chemical and Atomic Workers Int'l Union, Local 16-14* (1960), 10 L.A.C. 51; (1962) 33 D.L.R. (2d) 124 (S.C.C.). This result flows from what might be termed an ordinary canon of contract interpretation that a party to an agreement speaks for itself and makes itself answerable for its own conduct or misconduct unless the terms of the agreement clearly spell out an acceptance of liability for conduct or misconduct of others. Thus, every wild cat strike does not, in and of itself, trigger trade union liability. However, boards of arbitration have unanimously considered no strike pledges by trade unions to include an implicit obligation by the trade union and its officials not merely to refrain from instigating or promoting a strike but also an obligation to act promptly in the exertion of reasonable efforts to bring to an end any strike which may have begun spontaneously or without the union's encouragement or authority. In *Re U.E.W. and Canadian General Electric Company Limited* (1951), 2 L.A.C. 608 at page 611 Professor Laskin (as he then was) articulated this obligation in the following terms:

It need hardly be said that in order to discharge its affirmative obligation it is not enough for the union to go through the motions of giving back to work orders without more. In the case of a strike or stoppage called by a union, its liability is fixed at the very time the prohibited act occurs. In the case of a spontaneous or wild cat strike or stoppage, liability of the union depends on the action taken by it, having regard to its responsibility for its members and for non members. There must be prompt attempts to get the employees back to work. The nature and extent of these attempts will depend on the circumstances and the situation with which the union is confronted. It may well be necessary for the union, if coordinated efforts by its stewards and officers to terminate the stoppage are unsuccessful, to make concerted efforts and to obtain the permission of management to call a meeting on the premises for that purpose. It may be necessary to threaten, and even to take disciplinary measures against particular members of the union. At all events, it would seem that the initial obligation of the union should be to make known to management that the union has not authorized or encouraged the stoppage and thereafter to give continued evidence of this position by manifest steps to bring the stoppage to an end. It may, of course, be finally necessary for the union to report to management that it cannot control its members or other employees, thus leaving it to management to take such action as it sees fit. Such a procedure, in the board's view, is consistent both with union responsibility for contractual undertakings and with employer responsibility for directing the working force. It does not throw an absolute liability on the union but enables it to exculpate itself by tangible evidence of its good faith in meeting its undertaking....

It is our view that an affiliated bargaining agent has an analogous ongoing responsibility to engage in reasonable efforts to ensure that the strike called or authorized continues to be called

or authorized and on a uniform basis. It is not enough to call or authorize a strike initially and then to sit back and encourage, through inaction, the return to work of striking employees. An affiliated bargaining agent is obligated to call or authorize the strike in respect of all employees it represents in the ICI and this obligation must be held to be a continuing obligation. Province-wide bargaining takes away responsibility for negotiations from individual employers and unions and places that responsibility in the hands of central bodies. Such multi-party negotiations on a lesser scale were common in the construction industry but the structures were vulnerable to the whipsaw tactics of unions who would seek to break employer coalitions by permitting some employees to work during a strike to the disadvantage of others. Accreditation was a legal response to this problem but it failed because whipsawing and leap-frogging was still possible on a province-wide basis. Hence, the Act was amended to provide for compulsory province-wide single trade bargaining. The trade union's conduct before us is antithetical to any scheme of multi-party negotiations and could not possibly have been left unregulated. Moreover, to guard against the inventiveness of particular parties, general statutory language was used to give the Board a broad mandate to regulate this very important economic process. An affiliated bargaining agent must supervise affected work sites effectively and make reasonable efforts to convey to its members that a strike has been called and that they are not to work. The affiliated bargaining agent clearly cannot, on a selective basis, sanction the working of its members on particular projects by inaction and comply with its obligations under section 148(1). Moreover, where its members refuse to comply with the calling or authorizing of a strike notwithstanding the reasonable efforts of the affiliated bargaining agent, at the very least, the affected affiliated bargaining agents and employee bargaining agency are required to advise the employer bargaining agency that they are unable to control the situation so that the employer bargaining agency is able to exercise its rights vis-a-vis the employers it represents and to call a lock-out if it wishes to impose the uniformity that the affiliated bargaining agents of the employee bargaining agency are unable to achieve having exercised reasonable efforts. Whether an affiliated bargaining agent has taken reasonable steps to call or authorize a strike on a continuing basis must be decided having regard to all of the circumstances.

21. On the facts before us, we are prepared to hold that the Canadian National Construction Agreement signed by W. A. Stephenson Mechanical Contractors Limited with the United Association is null and void in the ICI sector of the construction industry in the Province of Ontario in that it constitutes or purports to constitute a collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than the mechanical trades provincial agreement. There can be no dispute that the work in question falls within the industrial, commercial and institutional sector of the construction industry and there is simply no role for agreements other than a provincial agreement. On the basis of this finding W. A. Stephenson and Local 46 are directed pursuant to section 89 to cease and desist acting in accord with the terms and conditions of the aforesaid agreement. We are further of the view that the evidence with respect to W. A. Stephenson indicates that the trade union is supplying men to the Lakeview Sewage Plant construction project and that such action, in and of itself, violates section 146(2) in the case of both parties and section 148(1) with respect to Local 46 alone. The supply of men by an affiliated bargaining agent in the context of a province-wide strike does constitute another arrangement contrary to section 146(2) notwithstanding that it is informal and undocumented. The use of the word "arrangement" was obviously intended to deal with all manner of bi-party relationships that undermine provincial bargaining. In relation to W. A. Stephenson, Local 46 has clearly failed to call or authorize the strike in respect of all employees represented by all affiliated bargaining agents affected thereby in the industrial commercial and institutional sector.

22. With respect to Local 527 and J. Porter and the work being performed on the Waterloo Motor Hotel, we find that the trade union is continuing to supply men to that project and therefore has not called or authorized a strike in respect of all employees represented by it in the industrial, commercial and institutional sector of the construction industry contrary to section 148(1). Local 527 and J. Porter through their inaction have supported or otherwise encouraged an unlawful strike. On the basis of Bud Fraser's conversation with Tom Crystal, we are satisfied that Local 527 members are working at the Kitchener site with the approval and consent of Local 527 and J. Porter.

23. The Board finds that Local 46 did supply men to Adam Clark on construction work falling within the industrial, commercial and institutional sector at the request of Adam Clark and that the supplying of such employees and the employing of them constitutes a breach of section 146(2) being an other arrangement. Both Adam Clark and Local 46 are directed pursuant to section 89 to cease and desist in acting in respect of this arrangement in respect of any work in the ICI sector. The Board further finds that Local 46 in supplying such men breached section 148(1) in that it did not call and authorize a province-wide strike in respect of all employees represented in the industrial, commercial and institutional sector of the construction industry having regard to the continuing nature of this statutory obligation. As we indicated above, the duty under section 148(1) is an ongoing duty requiring positive and reasonable steps to ensure that a strike continues to be called in accordance with the desires of the employee bargaining agency.

24. Turning to Sikora Mechanical Ltd., the Board finds that Local 46 is supplying men to Sikora Mechanical and that the supply of men and the employing of these men by Sikora Mechanical constitutes a breach of section 146(2) being an other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement. Pursuant to section 89 both Local 46 and Sikora Mechanical Ltd. are directed to cease and desist in acting in accord with this arrangement. The Board further finds that, in supplying men to Sikora Mechanical, Local 46 breached section 148(1) of the *Labour Relations Act* in that it has not called or authorized a strike in respect of all employees represented in the industrial, commercial and institutional sector of the construction industry. Not only do we find that Local 46 in supplying men to Sikora Mechanical has breached section 148(1), but in failing to take positive and reasonable steps to ensure that a strike of such employees continues to be called this section has been violated.

25. Having regard to the fact that the circumstances before us appear isolated and rather minor, we are content to give our declarations, orders and directions, based on the above finding, pursuant only to section 89. We also think in future cases that it would be prudent for an employer bargaining agency to call or authorize a province-wide lock-out after identifying such situations of concern and before complaining to this Board.

26. The Board therefore declares, orders and directs:

1. The national agreement between W. A. Stephenson Construction Co. Ltd. and the United Association is null and void in the ICI sector of the construction industry and W. A. Stephenson Construction Co. Ltd. and the United Association and Local 46 and its officers and agents are directed to cease and desist acting in accordance with its terms. Local 46 and its officers and agents are



further directed to cease and desist supplying men and otherwise acting contrary to section 148(1) of the Act by failing to take reasonable steps to call or authorize a strike as desired by the employee bargaining agency.

2. Sikora Mechanical Ltd. and Adam Clark Co. Ltd. and Local 46 and its officers and agents are directed to cease and desist acting in accord with all other arrangements contrary to section 146(2) of the Act and Local 46 and its officers and agents are directed to cease and desist supplying men to Sikora Mechanical Ltd. and Adam Clark Co. Ltd. and otherwise acting contrary to section 148(1) by failing to take reasonable steps to call or authorize a strike as desired by the employee bargaining agency.
  3. Local 527 and its officers and agents are directed to cease and desist acting contrary to section 148(1) by failing to take reasonable steps to call or authorize a strike as desired by the employee bargaining agency.
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## **2529-81-R International Association of Machinists and Aerospace Workers, Applicant, v. Sonora Cosmetics Inc., Respondent**

**Certification – Practice and Procedure – Two certification applications unsuccessful within short period of time – Neither application reaching hearing stage – No exceptional circumstances warranting imposition of bar against further application – Board indicating probable consequences in event of third unsuccessful application**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

**DECISION OF THE BOARD;** June 11, 1982

1. This is an application for certification. It is the second such application involving these parties. The first was filed on February 11, 1982, and was scheduled for hearing on March 5, 1982; but on the day fixed for the hearing, the applicant union requested in writing that it be granted leave to withdraw the application. By a decision dated March 8, 1982, the Board acceded to that request.

2. The second certification application was filed on March 5, 1982, and relates to the same group of employees. It was set down for a hearing on April 16, 1982, but once again, the applicant union seeks leave to withdraw. The circumstances of the second application, certain allegations as to what transpired on the day fixed for hearing, and the respondent's submissions as to the appropriate disposition of this case, are all contained in its letter dated May 4, 1982. That letter reads as follows (note that in paragraph 3 thereof, the respondent has incorrectly stated the date on which the application was made):

"On February 11, 1982 the applicant submitted an Application for Certification with respect to the Production employees of the respondent Sonora Cosmetics Inc., Board File 2338-81-R. The terminal date of said application was February 22, 1982 and it was scheduled for hearing before the board on May 5, 1982. The respondent replied to the aforesaid application in accordance with the provisions of the Act and Regulations and posted notices accordingly.

On March 5th the application was placed before an Officer of the Board and at that time the applicant requested leave to withdraw the said application. The Board issued final decision on the matter on March 8, 1982 and a copy of a decision was forwarded to the respondent by letter dated March 10, 1982.

On March 11, 1982 the applicant filed another application to represent the same group of employees of the respondent, Board File 2529-1-R. The terminal date for this application was March 19, 1982 and the application was originally scheduled to be heard on March 26th. On request of the applicant, the hearing date was deferred to April 16, 1982. On that date the application was brought before a Board Officer at which time the applicant and respondent were advised that the application before the Officer was 'as if the application was being formally heard by the Board'. In the processing of the application, the Officer determined that the applicant was in neither a certifiable[sic] position nor entitled to a vote. The Officer further advised the parties that the application would be dismissed. At that point, the representatives for the respondent requested that a bar be placed on further applications in accordance with Section 103, subsection 2(i) of the Labour Relations Act. This request was made in view of the fact the employees had been subjected to two applications within a very short period of time. The parties were advised and assured by the Officer that the request by the respondent was unnecessary and that the bar would be imposed. The representative for the applicant did not object to the request for the bar by the respondent or the statements by the Officer that a bar to further applications would be imposed.

I have been subsequently advised by the Officer that the bar referred to above would not be imposed and that the representations of the Officer were incorrect. The Officer further requested that the respondent make representations to the Board on this matter. The respondent hereby requests that the normal bar be placed on future applications to provide for a normalization of working conditions and atmosphere for the employees. This request is based on the following factors:

- (1) That the employees have been subjected to an atmosphere of certification from the commencement of the organization drive from January, 1980 until April 16, 1981, during which time they have been subjected to the posting of two notices of applications.

- (2) The representations of a Board Officer that a bar would apply.
- (3) The fact that the representative of the applicant did not object to the respondent's request for a bar and or the Board Officer's statement that a bar would apply.

The respondent hereby requests that this letter be placed before the Board and that the respondent be given further opportunity to make representations regarding the placement of a bar in accordance with Section 103, subsection 2(i) of the Labour Relations Act."

Thus, this is the second certification application which the applicant has made within a short period of time, and for this, and the other reasons set out in the respondent's letter, the respondent requests the Board to exercise its discretion under section 103 of the Act to bar a further certification application. The effect of such bar, of course, would be to prevent the respondent's employees for a period up to ten months, from seeking to engage in collective bargaining through the applicant as their bargaining agent.

3. The purpose of the *Labour Relations Act* is to encourage the practice and procedure of collective bargaining, and certification provides a mechanism whereby a union can become established as the employees' bargaining agent. Where there is no subsisting collective bargaining relationship, an application for certification can generally be made at any time (see section 5). Section 103 provides a limited temporary bar to the exercise of statutory rights where the Board, in its discretion, considers it advisable; however, the Board has been reluctant to exercise that discretion where the employees have not had the opportunity to express their wishes concerning trade union representation in a Board supervised representation vote. In *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91 at 94 the Board summarized its approach to section 103(2)(i) (then section 92(2)(i)) as follows:

"As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, 1976) OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶18, 026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) in other situations. The leading example of this is the *J. W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where 'in light of the special and extreme circumstances confronting the Board', namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in



previous irregular or improper conduct. (See *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).”

(To the same effect, see: *Patchoque Plymouth Hawkesbury Mills* [1972] OLRB Rep. Nov. 794; *Bernardine of Canada Limited* Board File 1437-75-R, decision dated January 26, 1976, — unreported; and *Mor-Alice Construction Limited* [1977] OLRB Rep. Oct. 668.)

4. In exercising its discretion under section 103, the Board has not been blind to practical (or tactical) realities of the situation. A certification proceeding may appear very straight-forward to an experienced labour law practitioner, familiar with the Board’s rules, policies, and jurisprudence, but to a layman or a union official who does not regularly appear before the Board, the certification process may not seem so simple. In the Board’s experience, it is neither unusual nor particularly surprising that from time to time, certification applications have to be withdrawn, or are dismissed because they are not properly launched or supported in accordance with the Act and Rules. But this fact alone does not justify the imposition of a bar to a further exercise of the employees’ statutory rights, nor does the Board’s established practice of permitting such applications seriously inconvenience the employer. No doubt, if the union tries again, the employer must file a new employee list and post new notices on its premises advising employees of the pending application for certification. However, this is a minor inconvenience, which must be carefully weighed against the result of prohibiting employees from making any application at all. Moreover, the Board is well aware of the potential effect on the momentum of the union’s organizing campaign if employees who have joined a union and indicated their desire for collective bargaining are prohibited from realizing this goal for as much as ten months. Unless there are exceptional circumstances which warrant prohibiting employees from proceeding with their attempt to organize (the *J. W. Crooks Limited* involved four unsuccessful applications in three months), the Board has been relatively lenient in imposing a bar under section 103. We are aware of no cases, nor did the respondent refer to any, where the Board has imposed a bar after the second unsuccessful application — especially where, as here, neither application ever matured into an actual hearing before the Board, and the employer is in the Toronto area so that there would be no serious inconvenience in attending at the Board offices on the day fixed for the hearing.

5. We have carefully considered the submissions of the respondent and find nothing in them which would prompt the Board to depart from its usual practice in circumstances such as those here present. The respondent requests the application of the “normal bar”, but as is apparent from the cases to which we have already referred, there is no bar “normally” imposed on a second unsuccessful certification application, unless the employer can demonstrate exceptional circumstances warranting it. None are apparent here, nor has the respondent adverted to any in its submissions. The respondent alleges that in discussions with a Board officer on this, the second certification application, the officer suggested first that a bar would be imposed, then, subsequently indicated that it would not follow in the ordinary course, and that the respondent should make written submissions on the matter. Those submissions were then made as noted above. Assuming, without finding, that the Board officer initially stated the established Board policy incorrectly, and later rectified that error by informing the respondent that the imposition was a matter for the Board’s discretion to which submissions should be directed, we are still not satisfied that in the circumstances of this case a bar should be imposed. Nor do we see any necessity for a further hearing in this matter. The respondent has been extended an opportunity to make submissions as to why a bar should be imposed, and there is nothing in those submissions which would prompt the Board to exercise its discretion to do so. A further hearing would therefore be superfluous.

6. Having regard to the foregoing, this application for certification is dismissed; but, in the circumstances, the Board sees no reason why it should exercise its discretion under section 103 of the Act to impose a bar to a further certification application. In so finding, however, the Board notes that it might well impose a bar after a *third* unsuccessful application, and if the union's membership evidence has not been collected within six months of the new application date, the Board may exercise its discretion to direct the taking of a representation vote even if the nominal employee support for the union exceeds the 55% level which would otherwise entitle the union to certification without recourse to a representation vote.

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**2323-80-M International Union of Operating Engineers, Local 793, Applicant, v. Traugott Construction Limited, Respondent**

**Construction Industry Grievance – Reconsideration – Strike – Reconsideration application challenging Board's jurisdiction to "strike down" collective agreement – Board clarifying its decision as simply denying the existence of collective bargaining relationship**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

**DECISION OF VICE-CHAIRMAN D. E. FRANKS AND BOARD MEMBER W. H. WIGHTMAN;** June 30, 1982

1. Counsel for the applicant has by letter requested the Board to reconsider its decision of November 27, 1981, in this matter. The grounds upon which the request for reconsideration is based are set out as follows:

"It is respectfully submitted that the Board exceeded its jurisdiction as follows:

(i) the Board does not have the jurisdiction to determine the "non-operation or avoidance of a collective agreement" whether sitting as an arbitration board with restricted powers or under the general powers granted to it under the Act. The Board does not have any residual, general, equitable or inherent jurisdiction and must operate within those specific powers given to it under the Act (see: *Re Shopmen's Local No. 734 and Brayshaws Steel Limited et al*, [1972] 2 O.R. 529 (C.A.); *Libby, McNeill and Libby of Canada Ltd. and United Automobile, Aerospace and Agricultural Implement Workers of Canada Ltd., et al* (1978) 21 O.R. (2d) 340 (Div. Ct.) (appeal allowed by Court of Appeal on procedural grounds (1978) 21 O.R. (2d) 362 (C.A.)). Further, it should be noted that the Board in *Williams Contracting Limited* [1980] O.L.R.B. Rep. July 1115, rejected the applicability of equitable principles when faced with the application of a collective agreement;

(ii) section 124(1) and (3) imposed a mandatory requirement upon the Board to hear and determine grievances referred to it for arbitration. The

Board specifically found the Working Agreement to have been executed by the parties in the absence of misrepresentation and duress. Further, to “decline to give effect to the Working Agreement” and “find there is no collective bargaining relationship between the applicant and the respondent” is tantamount to applying the doctrine of duress and in effect grants relief for precisely the reasons rejected. The Board does not have the jurisdiction to grant such equitable relief after recognizing that it had no jurisdiction to declare the Working Agreement void. We respectfully submit that the Board’s conclusion to decline to give effect to the Working Agreement is “patently unreasonable” in view of its mandatory requirement to hear and determine grievances referred to it under the Act (see: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* (1979) 97 D.L.R. (3d) 417 (S.C.C.)).

(iii) further and in any event, there is no requirement at law of “acceptance” in the nature of affirmation or ratification subsequent to the execution of an agreement in order to create a binding contract between the parties thereto in the absence of misrepresentation (see: *Panzer v. Zeifman* (1978) 20 O.R. (2d) 502 (C.A.); *Walton v. Landstock Investments Ltd.* (1976) 13 O.R. (2d) 693; *Bevan v. Anderson* [1957] 12 D.L.R. (2d) 69; *Consolidated Investments Ltd. v. Acres* (1917) 32 D.L.R. 597; and *Clough v. London & Northwestern Railway* (1871) L. R. 7 Ex. 26).

(iv) in the alternative, assuming but without admitting that such affirmation or ratification is a necessary requirement at law for a binding contract, the Board has failed to give effect to the evidence that the respondent expressly refrained from subcontracting interior construction work at the Collingwood Gateway Shopping Mall project to avoid breaching the Working Agreement and fulfilled the terms of paragraph 3(b) of the said Agreement by subcontracting the work to Losereit Sales & Service.

It is respectfully submitted that this request for reconsideration raises significant and important issues in respect of the Board’s jurisdiction and therefore, we request that the Board reconsider and revoke the decision and continue to process this referral of grievance to arbitration.”

2. The matters raised by counsel for the applicant in paragraphs 1 and 2 of his letter were arguments that were made to the Board at the hearing in this matter and were considered in its decision. It is our view, however, that they do not reflect the reasoning of the Board in arriving at the conclusion it arrived at in its previous decision in this matter. Although the net effect with respect to the present application may be the same as a finding of an avoidance of a collective agreement “or the granting of equitable relief”, that was not the reasoning of the Board in its previous decision.

3. In view of this possible misunderstanding, it is advisable to outline the reasoning followed by the Board in its previous decision. In paragraph 21 of its decision dated November 27, 1981, the Board noted that in a referral of a grievance under section 124 of the Act, the



Board has the power to apply the various provisions of the *Labour Relations Act* and cited the example of the application of section 1(4) and section 63 of the Act. In the present case, the Board found a clear violation of sections 74 and 76 of the Act. On the facts in the present case, the violations of these sections were not technical violations of the Act but in a very real sense strike at the very heart of the *Labour Relations Act*. It is clearly trite to say that there are two major thrusts of the *Labour Relations Act*. First the representation of employees by trade unions and the orderly acquiring of bargaining rights through the certification process. This orderly process, of course, is an alternative to the recognition strike. The other main thrust of the Act deals with the lawfulness and unlawfulness of strikes in certain circumstances. In the present case, we found that there was clearly an unlawful strike as a result of which certain bargaining rights were acquired by the affiliates of the Building Trades Council through the Working Agreement.

4. In the present case, therefore, the Board was faced with the problem that a grievance had been referred to the Board under section 124 of the Act and that grievance was founded on a collective agreement that came into existence as the result of an unlawful strike. That is, the very bargaining rights on which the applicant claimed to have a collective agreement were the result of an unlawful strike which clearly was intended to avoid the certification proceedings in the *Labour Relations Act*. For the Board to deal with such a grievance would be tantamount to the Board turning a blind eye on violations of the Act which go to the very purpose of the *Labour Relations Act*. In these circumstances, the Board did not strike down the collective agreement as suggested by counsel for the applicant, but rather found in paragraph 23, "there is no collective bargaining relationship between the applicant and the respondent, such as would entitle the Board to hear the referral of a grievance under section 124 of the Act." In making this finding, the Board refused to put its stamp of approval on the unlawful conduct which gave rise to the alleged collective bargaining relationship.

5. With respect to the matters raised in paragraphs 3 and 4 of the letter by the applicant, the Board was not suggesting there was any requirement at law "of an acceptance" but rather, as suggested in paragraph 4, that where there has been an acceptance by an employer of an agreement obtained under unlawful circumstances that the employer may subsequently not be entitled to raise the initial illegal conduct. However, the Board specifically found that the changing of the subcontract at the Collingwood Gateway Shopping Mall was not conduct sufficiently unambiguous in its nature as to indicate an acceptance by Traugott of the Working Agreement.

6. For the foregoing reasons, the request for reconsideration by the applicant is therefore denied.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. My dissent of November 27, 1981 still stands.

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**0143-82-R Canadian Union of United Brewery, Flour Cereal, and Distillery Workers, Applicant, v. Uxbridge Beverages Ltd., Respondent, v. Group of Employees, Objectors**

Certification – Petition – Petition and counter-petitions filed with Board – Reasons why employees signed counter-petitions not relevant consideration where no misconduct – Whether anonymous telephone caller said something improper – Whether failure to testify as to custody of counter-petitions affecting their validity.

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

**APPEARANCES:** *E. G. Posen and Bob Hill for the applicant; D. I. Wakely, H. E. Orser, and R. J. Marshall for the respondent; Colin Still, David Mather and Henry Prozewko for the objectors.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** June 4, 1982

1. This is an application for certification.

• • •

*[bargaining unit descriptions omitted]*

6. Having further regard to all of the evidence before it, the Board finds that there were 53 employees in the bargaining unit at the time the application was made, excluding William Andrechuk whose status is in dispute. Regardless of whether Mr. Andrechuk is included in or excluded from that bargaining unit, the applicant would normally need the support of only 30 of those 53 or 54 employees to be entitled to be certified as bargaining agent for that unit without a representation vote. The applicant filed documentary evidence for 33 of those employees in the form of combination applications for membership and attached receipts. However, there was also filed with the Board a timely statement of desire or petition in opposition to the certification of the applicant, bearing the signatures of 34 employees, 10 of whom had signed membership cards in the applicant and paid the required initiation fee. There were also filed with the Board 9 counter-petitions signed by 9 employees, 8 of whom had both signed the petition and joined the applicant, and who, by such counter-petitions, purported to withdraw their support for the petition and to reaffirm their support for certification of the applicant.

7. The effect which the Board has consistently given to voluntary counter-petitions, which are also referred to in the Board's jurisprudence as revocations or reaffirmations of support, is aptly described in the following passage from *National Seal Division of Oil Seals Ltd.* 63 CLLC ¶16,295:

“The effect of counter petitions or revocations in respect of signatures placed on an earlier petition in opposition to an application for certification has been considered by the Board in the past and again recently in *The Fleck Manufacturing Ltd.* case, CCH Canadian Labour Law Reporter, vol. 1, ¶16,236, at p. 13,201, as follows:

In cases where revocations are filed in respect of signatures to a petition and it is evident to the Board from all persons signing the revocations intended to revert to and reaffirm their original positions as reflected by the evidence of membership filed by the union, the revocations and original evidence of membership represent the most persuasive and reliable evidence of their wishes...

We are constrained to infer from the facts agreed to by all counsel in this case that the persons who signed the counter petitions did so with the intention of reverting to and reaffirming their original positions as reflected in their applications for membership and receipts filed by the union as evidence of membership. In our view, therefore, the most reliable evidence of the true wishes of the employees is that which is represented by the original evidence of membership submitted by the union and now reaffirmed by the counter petitions."

(See also *Leon's Furniture Limited*, [1982] OLRB Rep. March 404; *Swingline of Canada Ltd.*, [1973] OLRB Rep. March 159; *The Great Atlantic and Pacific Tea Company Limited*, [1970] OLRB Rep. Dec. 934; and *White Die Casting Company Limited*, [1970] OLRB Rep. Dec. 948.)

8. After the Board had heard evidence and argument with respect to the counter-petitions, the parties advised the Board that in order to expedite the hearing of this application, they were prepared to adopt the approach endorsed by the Board in *Leon's Furniture*, *supra*, by agreeing that the petition was, subject to the existence of the counter-petitions, a voluntary expression of employee wishes at the time it was signed. Thus, none of the parties sought to adduce any evidence with respect to the origination or circulation of the petition, nor was there any suggestion that, if the Board found (a sufficient number of) the counter-petitions to be voluntary, there were any circumstances which should, nevertheless, prompt the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken.

9. Bob Hill, the Executive Secretary of the applicant union, personally witnessed the signatures of 8 of the 9 employees who signed counter-petitions. Each of those typewritten documents reads as follows:

"Ontario Labour Relations Board  
File #0143-82-R

Mr. D. K. Aynsley,  
Registrar,  
Ontario Labour Relations Board,  
400 University Avenue,  
TORONTO, Ontario.



Dear Mr. Aynsley,

*RE: APPLICATION FOR CERTIFICATION EXBRIDGE BEVERAGES LTD., UXBRIDGE, ONTARIO AND CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS.*

On or about [a specific date], I signed a petition addressed to the Board in opposition to the Application For Certification made by the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers.

Of my own free will, I have reconsidered and hereby request that the Ontario Labour Relations Board disregard my signature on any statement of desire filed with the Board in opposition to this Application For Certification, bearing a date prior to this date.

It is my true wish that the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers represent me as bargaining agent in my relationship with Uxbridge Beverages Ltd.

Dated at [a specified municipality] Ontario, this [specified] day of April 1982.

Yours truly,

*[signature of employee]*

Signature witnessed by

*[Signature of Witness]"*

The Board is satisfied from its comparison of the dates specified on the counter-petitions witnessed by Mr. Hill, as confirmed by his testimony, and the dates specified on the petition, that the 8 counter-petitions witnessed by Mr. Hill were signed following the signing of the petition in opposition to the applicant.

10. Mr. Hill drafted the counter-petitions on April 26, 1982 after he became aware that a petition was being circulated in opposition to the applicant and that some of the employees were upset because "they'd been told one thing by [Mr. Hill] and another thing by management". Although the evidence concerning precisely what was told to employees by the management of the respondent (which elected to call no evidence in these proceedings) was rather sketchy, it appears that as a result of a meeting which management held with employees, at least some of the respondent's employees had concerns about what might happen to their "seniority" as a result of a "transaction in the works" whereby the respondent might purchase an operation in Peterborough for which the applicant has bargaining rights. Since there are "a lot of young employees" employed by the respondent in Uxbridge, a number of them were concerned that a merger of the Uxbridge and Peterborough seniority lists might disadvantage them. In order to "clear up some of the questions that the people in Uxbridge seemed to have

because of the meeting management had with them” and in order to give employees an opportunity to sign counter-petitions, Mr. Hill arranged for a meeting to be held at the Navy Club in Oshawa commencing at 7:30 p.m. on April 27, 1982. Employees were notified of that meeting through telephone calls made by one of their fellow employees at the request of Mr. Hill.

11. In 1978 while Mr. Hill was the applicant’s Assistant Executive Secretary, the applicant was involved in another certification application in respect of the employees of the respondent at Uxbridge. It was the uncontradicted evidence of Mr. Hill that a number of the respondent’s present employees were familiar with the petition and counter-petition process as a result of their involvement in that earlier application. Prior to the meeting at the Navy Club on April 27th, Mr. Hill telephoned one of the employees whom he had known since 1978 and asked him if he was coming to the meeting. Mr. Hill told the Board that he knew the employee in question “has a problem getting to meetings”. That employee told Mr. Hill that he would not be going to the meeting but that he “would like to see” him. When Mr. Hill attended at the residence of that employee at approximately 5:30 p.m. on April 27th, the employee told him that he had signed a petition and “wanted to sign something to get his name off the petition”. Accordingly, Mr. Hill provided him with one of the counter-petitions and witnesses his signing of that document.

12. A second employee signed a counter-petition at his (the second employee’s) home in the presence of Mr. Hill approximately one-half hour before the April 27th meeting. That employee, who had also been employed by the respondent in Uxbridge during the applicant’s 1978 organizational drive, had telephoned Mr. Hill on April 26, 1982 and arranged for Mr. Hill to attend at his residence on the following day. After signing the counter-petition, that second employee attended the meeting at the Navy Club.

13. The meeting at the Navy Club on April 27th was conducted by Mr. Hill, who answered employee questions about matters that were of concern to them. In particular, Mr. Hill assured the employees that if the application for certification was successful, “they would have the right to decide what their destiny would be, not the people in Peterborough.” There were approximately 16 employees in attendance at that meeting. Near the end of the meeting, which lasted for approximately one and one-half hours, 6 of those employees signed counter-petitions in the presence of Mr. Hill, who witnessed each of their signatures.

14. Following the meeting, Mr. Hill gave the 8 counter-petitions which he had witnessed to Dave MacMillen, an organizer in the employ of the applicant, for transmittal to the Board. Those 8 counter-petitions were sent to the Board by registered mail on April 29, 1982, the terminal date fixed for this application, together with a further counter-petition which purports to be witnessed by Mr. MacMillen. Since neither Mr. MacMillen nor anyone else gave evidence before the Board from his personal knowledge and observation with respect to the circumstances concerning the origination of that (ninth) counter-petition, and the manner in which the signature on it was obtained, the Board will give no weight to that document.

15. Although counsel for the objectors contended that there was “a grave doubt” concerning the credibility of Mr. Hill, the Board found Mr. Hill to be a credible witness whose uncontradicted evidence we accept without reservation. Counsel for the respondent contended that the Board should disregard the counter-petitions because Mr. Hill was unable

to “give any evidence of why [the employees] would sign” those documents and could not “shed any light on what was said to them by the unnamed person [who telephoned them] to get them to come to the meeting”. He further submitted that the Board should give no weight to the counter-petitions because there is a “gap” in the evidence with respect to the custody of those documents due to Mr. MacMillen’s failure to testify concerning the time during which the counter-petitions were in his possession prior to their transmittal to the Board by registered mail. However, the Board is satisfied on the evidence before it that the 8 counter-petitions witnessed by Mr. Hill reflect a voluntary expression of the wishes of the employees who signed them and that the most reliable evidence of the true wishes of employees is that which is presented by the original evidence of support for the certification of the applicant filed with the Board in the form of combination applications for membership and receipts, and subsequently reaffirmed by those counter-petitions. Although some of the employees who signed both a membership card and the petition did not subsequently sign a counter-petition, the number of such employee is not sufficient to prompt the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken.

16. As stated by the Board in *Fleck Manufacturing Ltd.*, *supra*, the “reasons why employees want or do not want a union is, of course, not a relevant consideration of the Board except to the extent that the desires of such employees for or against the union may have been improperly influenced, e.g. by threats, intimidation or misrepresentation.” There is nothing in the circumstances of this case which suggests that any of the employees who signed the 8 counter-petitions witnessed by Mr. Hill were influenced to sign them by threats, intimidation or misrepresentation. Even if the Board were to hypothesize that the employee who telephoned his fellow employees to notify them of the April 27th meeting might have said something improper to one or more of them, such as stating that they would lose their jobs unless they signed a counter-petition, it is clear that those employees had an ample opportunity at the meeting (or during the personal meetings which two of them had with Mr. Hill at their respective residences) to question the validity of any such statements and to obtain an authoritative answer from Mr. Hill, who is a high ranking official of the applicant and an experienced union organizer. Moreover, the fact that 10 of the 16 employees who attended that meeting elected not to sign counter-petitions is inconsistent with the existence of intimidation, coercion or other improper conduct.

17. The Board is also of the view that the failure of Mr. MacMillen to testify before the Board with respect to his custody of the 8 counter-petitions witnessed by Mr. Hill does not affect the voluntariness of those documents. In this regard, the following comments by the Board in *Fuller’s Restaurant*, [1980] OLRB Rep. Sept. 1289, are instructive:

“18. The Board has held that the requirement for first-hand evidence of the ‘circumstances surrounding the origination, preparation and circulation of a statement of desire places the onus on those wishing to establish the voluntariness of the statement to call evidence of how each of the signatures was obtained as well as evidence detailing the physical preparation and the actual delivery of the document to the Board’. (See *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696.) Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from preparation to delivery to the Board may prove



fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement. *The Board, however, has never rejected a petition simply for the reason that it lacked first-hand evidence of the delivery of the document.* The issue is one of voluntary expression and if the Board is satisfied that the origination and preparation of the statement is free of employer interference and is further satisfied that each of the signatures has been obtained in circumstances which would not thwart free expression and where, as in this case, a legitimate reason exists for the absence of the person who mailed the petition, the Board would be hard pressed to find that it had not been satisfied as to the voluntariness of the statement. The Board was faced with a gap in the evidence relating to delivery in *Weston Bakeries Limited*, [1979] OLRB Rep. Dec. 1309 (a termination of bargaining rights case) and in refusing to reject the petition filed in support of that application pointed out that there was 'no suggestion that the petition may at some point have fallen into the hands of management' and further, 'that the deficiencies in the evidence with respect to the matter of custody occur subsequent to the obtaining of all signatures on which the Board is relying and the evidence does not disclose that the petition was being handled so loosely as to have given employees the impression that it might at some point come to the eye of management'." (emphasis added)

(In that decision, which followed a judgment dated March 11, 1980 (reported at 80 CLLC 14,021) in which the Supreme Court of Ontario quashed the Board's initial decision certifying the applicant, the Board found a petition filed by the objectors to be a voluntary expression of the wishes of those who signed it, despite the "lack of first-hand evidence of its delivery to the Board".) Although those comments were made in the context of a petition, they are equally applicable with respect to counter-petitions. As noted above, Mr. Hill, the Executive Secretary of the applicant, gave the 8 counter-petitions that he had personally witnessed to Mr. MacMillen, an organizer employed by the applicant, who subsequently mailed them to the Board by registered mail. As stated by the Board in *Fuller's Restaurant (supra)*, where documents such as petitions or counter-petitions disappear from sight while they are being signed without any explanation concerning their whereabouts, such gaps in the evidence concerning custody of the documents may lead the Board to infer that the handling of the documents was so loose or careless that they should not be relied upon as evidence of the voluntary wishes of employees. In the case of a petition, the Board is particularly concerned that the document may come to the attention of management during such "gaps" and that employee perceptions of the way in which the petition is being circulated may lead them to sign the document out of fear that it may come into the possession of a member of management who may infer from the absence of certain employees' signatures that they are union supporters and penalize them as a result. No corresponding fear arises in the context of a counter-petition since employees can safely assume that union officials will not bring to the attention of management that they have signed a union card or counter-petition affirming

their support for the certification of the union. (While peer pressure and “salesmanship” may often be operative factors which assist union supporters in persuading employees to sign documents in support of certification such as membership cards and counter-petitions, similar factors are also frequently operative in the context of petitions circulated by employees opposed to certification. The presence of such factors, which are inherent in the certification process, does not, by itself, render such documentary evidence involuntary or otherwise unreliable.) Mr. MacMillen’s possession of the 8 counter-petitions in question did not commence until after they had been signed by the employees and delivered to him by Mr. Hall. There is nothing to suggest that any of the 8 signatories were aware that the documents would be given to Mr. MacMillen, but even if they had been aware that this would happen, it is difficult to see how their decision to sign a counter-petition would have been affected by such information. It is not apparent to the Board how an employee would be coerced, intimidated, or in any other way deprived of the ability to voluntarily express his true wishes with respect to the certification of the applicant as his bargaining agent, by knowledge that the union official who witnessed his signature on a counter-petition intended to give those documents to another official of the applicant for transmittal to the Board by registered mail.

18. On the basis of all the evidence before it, the Board is satisfied that regardless of whether William Andrechuk (whose status, as noted earlier in this decision, is in dispute) is included in or excluded from the bargaining unit, more than fifty-five per cent of the employees in bargaining unit #1 at the time the application was made, were members of the applicant on April 29, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Thus, the applicant’s right to certification with respect to bargaining unit #1 cannot be affected by the Board’s ultimate decision as to the inclusion in or exclusion from the bargaining unit of William Andrechuk. Moreover, for the reasons set forth above, the Board, in the exercise of its discretion under section 7(2) of the Act, declines to direct that a representation vote be taken in the circumstances of this case.

19. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, and pending the final resolution of the composition of bargaining unit #1, certifies the applicant as the bargaining agent for all employees of the respondent in Uxbridge, Ontario, save and except foremen, those above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, and pending the final determination of his employment status, excluding as well William Andrechuk.

20. A final certificate must await the final determination of the composition of the bargaining unit.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. I disagree with the majority and would have ordered a vote.

2. Contrary to the opinion expressed at paragraph 17 of the majority decision, I believe that in contemporary society peer pressure and/or union institutional pressure can be very real and that indeed the concerns which Board practice reflect in the rigorous search for employer influence or awareness in the case of a petition (i.e., statement of desire not to be

represented by a particular union), should be of parallel concern in the examination of counter-petitions. Unfortunately, in the case of the latter, no suitable tests can be devised nor remedies fashioned.

3. Whereas petitions can be drafted and submitted without either the union *or* employer knowing who has signed, this is not so in the case of a counter-petition. Moreover, although it was not so in the case before us, counter-petitions can be drafted and signed concurrent with the signing of membership cards.

4. As has been pointed out, the legislation does not provide for counter-petitions. Rather they are a creature, or perhaps extension, of the certification process and have been given legitimacy by the Board.

4. Whatever gave rise to the Board practice of viewing counter-petitions in years past, I believe it is a practice which should be reviewed. The more mature reflection which is now possible in the light of empirical evidence and our knowledge of contemporary society should, I feel, lead us to conclude that counter-petitions have no place in the process and should be given no weight.

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### **1886-81-M Amalgamated Clothing & Textile Workers Union, CIO-CLC, Applicant, v. Vagden Mills Limited, Respondent.**

**Employee – Employee Reference – Whether “fixer-foremen” and quality control supervisor exercising managerial function – Board reviewing applicable principles – Effect of parties historically treating person as excluded**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

**APPEARANCES:** *B.W. Adams and T. Tracey for the applicant; K. W. Kort and P. Crowle for the respondent.*

#### **DECISION OF THE BOARD; June 18, 1982**

1. This is an application under section 106(2) of the *Labour Relations Act*. A question has arisen between the parties concerning the employee status of a number of individuals working for the respondent at its knitting mill in Trenton, Ontario. The employer contends that these individuals “exercise managerial functions” and, consequently, are not employees within the meaning of the *Labour Relations Act*. The union asserts the contrary. The relevant section of the Act is as follows:

1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.



2. For some years, the union has been the bargaining agent for a number of the respondent's employees; but, historically, certain individuals have not been considered part of the bargaining unit. In 1981, the union filed a certification application seeking to represent some of them; however, when the matter came on for a hearing before the Board, the parties reached agreement that if the disputed individuals were indeed employees within the meaning of the Act, they were already represented by the union and covered by the parties' existing collective agreement. The parties were further agreed that the proper vehicle for resolving this question was a reference under section 106(2). Hence, the instant application.

3. In accordance with its usual practice, the Board appointed a labour relations officer to inquire into the duties and responsibilities of the subject individuals. The evidence taken was transcribed and comprises a bound volume of some 185 pages. After the release of the officer's report to the parties, the Board scheduled a hearing to give each of them the opportunity to make representations as to the conclusion which, in their submission, the Board should reach in view of the report. That hearing took place in Toronto on April 27, 1982.

4. Section 1(3)(b) has been in the Act, in its present form, since 1957 when the Legislature amended the statute to clarify the Board's jurisdiction and reemphasize the finality of its decisions in this area. Since that time, there have been literally hundreds of cases, both reported and unreported, in which the Board has been called upon to apply section 1(3)(b) in different economic and industrial contexts. We see no need to review that extensive jurisprudence here; for the instant case does not raise any novel question of law, nor are the facts particularly complicated. It will be sufficient therefore to briefly reiterate the purpose of section 1(3)(b), and refer to one observation made in an earlier case which is of particular relevance here. (However, for a recent decision summarizing the Board's general approach to section 1(3)(b) questions, see *Corporation of the City of Thunder Bay* [1981] OLRB Rep. Aug. 1121; and see generally *Sack and Levinson Ontario Labour Relations Board Practice* pp 25 - 34, and pp 9 - 14 of the 1977 updating supplement).

5. At common law and in most statutes, managerial personnel are regarded simply as "employees" with the same rights and privileges as other employees. But in the collective bargaining realm, this would create an anomaly. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Managerial employees might find themselves faced with a kind of "conflict of interest" as between their responsibilities as union members. Section 1(3)(b) ensures that neither the union nor the employer and its management team need be concerned about such "divided loyalties" which are potentially corrosive to the interests of both sides. This purpose has been succinctly stated by the British Columbia Relations Board in *Corporation of the District of Burnaby* [1974] 1 Can. LRBR at p. 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the

employer, employees organize themselves into unions in which the bargaining power of all is shared somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. A historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the efforts is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.”

6. The Ontario *Labour Relations Act* does not contain a definition of the term “managerial functions”, nor are there any statutory criteria to guide the Board in reaching its opinion. The task of developing such criteria has been left to the Board to work out on a case by case basis, in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, and in light of its own developing knowledge and experience in collective bargaining matters. But while the line between “manager” and “employee” is often difficult to draw in particular cases, there is one common theme which pervades all of the cases involving so called “first line” managerial employees or “foreman”: the extent to which the disputed individuals make decisions which significantly affect the economic lives of their fellow employees, thereby raising a potential conflict of interest with

them. It was that kind of conflict which section 1(3)(b) was designed to avoid. Thus, in a collective bargaining context, such things as the right to hire, fire, promote, demote, grant wage increases, or discipline other employees should be regarded as manifestations of managerial authority, the exercise of which would be incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

7. In concrete cases, of course, the picture is likely to be clouded. There is no universal ratio of superiors to subordinates, consultation or “input” cannot be confused with decision-making, and neither technical expertise nor the importance of an employee’s functions can be automatically equated with managerial status. The engineers and scientists employed by Spar Aerospace Products Limited undoubtedly made an important contribution to the development of the extendible arm produced by that company and now used on the NASA Space Shuttle; but they were not managerial employees in a labour relations sense (see *Spar Aerospace Products Limited* [1979] OLRB Rep. July 700). Similarly, the role of nurses in a hospital or nursing home setting is of considerable importance; but, again, this does not mean that they exercise “managerial functions” and must be denied access to collective bargaining. (For a review of the way in which the Board has treated health care professionals in that setting, see *Oakwood Park Lodge* [1982] OLRB Rep. Jan. 84). Finally, it is important to recognize that co-ordinating or limited supervisory functions may, but need not always, be associated with managerial status. Where numbers of people work at a common enterprise, there will be individuals engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of employer policies, and subject to real managerial authority which is actually exercised from above. These co-ordinators do not make decisions which directly impact (positively or negatively) on the livelihood or job security of their fellow employees, their functions do not raise the mischief to which section 1(3)(b) is directed, and should not be regarded as “managerial” as that term is used in a remedial statute designed to extend employees the right to engage in collective bargaining.

8. Most business enterprises require a range of employee skills, and they will typically be an occupational and wage hierarchy. Sometimes this hierarchy will be formalized in a pattern of established job positions and descriptions. But this does not mean that an individual at the apex of a job progression exercises “managerial functions” — even though he may have higher skills, more responsibilities, or earn a higher income. In *Corporation of the City of Thunder Bay, supra*, the Board commented:

“In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced “journeymen” or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that



they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining — especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows: (Quote omitted). In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)."

In our view this observation is particularly opposite in the instant case in respect of the "fixers" or "fixers-foremen" who are obviously highly skilled individuals who render valuable service to the respondent.

9. The position of the various so-called "fixer-foremen" is sufficiently similar that they can be dealt with as group. The evidence respecting these individuals differed in some details but, in the main, their responsibilities were very much the same. And, in our opinion, none of them exercise managerial responsibilities within the meaning of section 1(3)(b) of the *Labour Relations Act*.

10. We do not think it is necessary to reproduce, as reasons, a recitation of the facts outlined in the officer's report. It is sufficient to say that this evidence does not demonstrate that the fixer-foremen have the authority to regularly or materially impact upon the livelihood or job security of their fellow employees, such that inclusion in a bargaining unit with them, would raise the kind of collective bargaining conflict of interest which section 1(3)(b) was designed to avoid. The fixer-foremen are primarily concerned to ensure that the machines are running properly. They may incidentally assign duties, correct mistakes, and have certain residual training responsibilities; however, their primary concern is the ongoing operations and maintenance of the machines themselves. Their direction of other employees is purely incidental. There is little indication of real "managerial" authority within the meaning of section 1(3)(b), and where such indications do exist, the evidence is hypothetical and speculative. For example, Archer thought he could issue a verbal reprimand with the approval of Mr. Kennedy, the knitting supervisor; but had never reprimanded or recommended any form of discipline; and Lyon's disciplinary authority never extended beyond a verbal admonishment. Archer testified that he might tell his superiors how a particular employee was doing, but had never granted a wage increase, nor had he ever on his own initiative taken on an unsatisfactory employee off the machine. Denham had never recommended a promotion, a wage increase, a termination, or granted time off. Grant thought he could recommend a wage increase and could authorize overtime, but he has never done so. Nor has Grant ever made a written performance evaluation of an employee (and in this respect, it might be noted that it is

not the making of a performance evaluation which is important but its *effect* on the livelihood of the employee evaluated.) Lyon testified that he could select summer students from a group previously interviewed by someone else. Neither Denham or Grant had ever granted an employee time off, and Lyon suggested that he had this authority if he first checks with a superior. Swoffer thought that he could recommend that an individual be hired although he has never done so. He testified that he could grant time off with a superior's approval. Having carefully considered that evidence in its totality, the Board is of the opinion that the fixer-foremen do not exercise managerial responsibilities within the meaning of section 1(3)(b) of the *Labour Relations Act*.

11. The situation of Ms. MacLellan, the quality control supervisor, is much closer to the line; for the evidence is not as clear in her case as it is in respect of the "fixer-foremen". She is a salaried employee who resigned from the union some years ago when she was promoted to her present position. She cannot grant time off, does not directly discipline employees and cannot grant wage increases. However, she does attend grievance meetings on behalf of management for the purpose of taking notes even though she is not involved in the actual decision-making, and about a year ago, in her supervisor's absence, she interviewed and hired two employees. She also recommended that an employee be terminated because of poor work performance. Although in this case, the employee was only sent a warning letter, it appears that MacLellan's recommendations did have an adverse impact. While formal evaluations of employees are done by their immediate supervisor, it appears that Ms. MacLellan can also make some notation by way of warning or reprimand which can affect the employee's future. It is clear therefore that Ms. MacLellan may seldom make any independent decisions adversely affecting her fellow employees' situation, however, incidental to her quality control function, there are instances in which she has taken action by means of observation or recommendation with consequences that fall within the "mischief" or raise the kind of "conflict of interest" which underlies section 1(3)(b).

12. Had the situation of Ms. MacLellan been viewed afresh or been raised shortly after her promotion to her present position, the Board might well have concluded that, on balance, her supervisory or admonitory functions are purely incidental to her quality control concerns, and are not such as to require her exclusion from the bargaining unit. But it appears that she was always treated as excluded by *both parties*, and in consequence, developed a relationship with her employer (for example, by taking minutes of grievance meetings on behalf of the employer) which associated her with the "management team". This historical dimension cannot be ignored when deciding close cases; for as the Board observed in *Corporation of the City of Thunder Bay, supra*:

"A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accomodate the interest section 1(3)(b) was designed to protect."

We do not think the evidence adduced by the applicant union falls within those parameters and having regard to it in its totality (including the historical dimension wherein the union accepted for many years that the quality control supervisor should be excluded from the

bargaining unit.) we are of the opinion that Ms. MacLellan exercises managerial responsibilities within the meaning of section 1(3)(b) of the Act and must therefore be excluded from the applicant union's bargaining unit.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD MAY 1982

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**0507-81-R:** Ontario Nurses' Association, (Applicant) v. The Homewood Sanitarium of Guelph, Ontario Limited, (Respondent).

Unit: "all registered and graduate nurses of the respondent employed in a nursing capacity in Guelph, Ontario, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week". (64 employees in unit). (*Having regard to the agreement of the parties*).

**1378-81-R:** Canadian Union of Public Employees, (Applicant) v. Clifton House for Boys, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except the Executive Assistant to the Executive Director, persons above the rank of Executive Assistant to the Executive Director, Bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (17 employees in unit).

**1755-81-R:** Ontario Public Service Employees Union, (Applicant) v. The Corporation of the Town of Kemptville, (Respondent).

Unit: "all employees of the respondent at Kemptville, Ontario, save and except foremen, persons above the rank of foreman, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (8 employees in unit). (*Clarity Note*).

**2166-81-R:** Peterborough Typographical Union Local 248 (I.T.U.), (Applicant) v. Peterborough Examiner a Division of Canadian Newspapers Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees in the editorial department of the respondent whose head office is in Peterborough, Ontario, save and except the managing editor, city editor, news/wire editor, editorial page editor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (448 employees in unit).

Unit #2: "all employees of the respondent whose main office is in Peterborough, Ontario, save and except advertising manager, classified manager, publisher, business office manager, circulation manager, confidential secretary to the publisher, editorial department, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (44 employees in unit).

**2256-81-R:** United Brotherhood of Carpenters and Joiners of America Local 1256, (Applicant) v. K. Blok Andersen Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except foremen and persons above the rank of non-working foreman." (15 employees in unit).

**2551-81-R:** The Professional Staff Association of the Children's Aid Society of Hamilton-Wentworth, (Applicant) v. The Children's Aid Society of Hamilton-Wentworth, (Respondent).

Unit: "all Child Care, Social Work and professional staff of the respondent employed in the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for not more than twenty-four hours per week and persons represented by the Office and Professional Employees International Union, under a certificate dated March 15, 1982." (58 employees in unit). (*Clarity Note*).

**2613-81-R:** Ontario Public Service Employees Union, (Applicant) v. Bruce Peninsula & District Memorial Hospital, (Respondent).

Unit: "all employees of the respondent at Wiarton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisor." (6 employees in unit).

**2700-81-R:** Amalgamated Clothing and Textile Workers Union — Toronto Joint Board, (Applicant) v. Ontario No. 500716 Ontario Limited c.o.b. as Valley Slacks, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2741-81-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Zolna Construction Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0024-82-R:** Canadian Union of Public Employees, (Applicant) v. Newmarket Public Library, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Newmarket, Ontario, save and except chief librarian, assistant to the chief librarian, department heads, persons above the rank of department head, secretary bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed, in Newmarket, Ontario, for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except chief librarian, assistant to the chief librarian, department heads, persons above the rank of department head and secretary bookkeeper." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).



**0044-82-R:** General Workers Union, Local 1030 of The U.B.C. and J. and A., (Applicant) v. Ottawa Door Consultants Ltd., (Respondent).

Unit: "all employees in the employ of the respondent engaged in the delivery, installation, repair and maintenance of doors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except foremen, carpenters and carpenters' apprentices, office and sales staff." (8 employees in unit). (*Clarity Note*).

**0055-82-R:** Canadian Union of Public Employees, (Applicant) v. Corporation of the County of Essex Sun Parlor Home for Senior Citizens, (Respondent).

Unit: "all office and clerical employees of the respondent in Leamington, Ontario, save and except office manager and persons above the rank of office manager." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0065-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Poli-Fibreglass Industries Ltd., (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0083-82-R:** Retail, Wholesale and Department Store Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Willet Foods Limited, (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except office staff, team managers, and persons above the rank of team manager." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0085-82-R:** Christian Labour Association of Canada, (Applicant) v. Nik-Nak Food Mart Inc. c.o.b. Dresden K Store, (Respondent).

Unit #1: "all employees of the respondent in Dresden, Ontario, save and except assistant manager, persons above the rank of assistant manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Dresden, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant manager, persons above the rank of assistant manager and office staff." (13 employees in unit). (*Having regard to the agreement of the parties*).

**0093-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Loughney Dewatering Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial,

commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0096-82-R:** Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. H.J. McFarland Memorial Home, (Respondent).

Unit: "all employees of the respondent in the Township of Hallowell save and except supervisors and persons above the rank of supervisor, registered and graduate nurses, office and clerical staff". (64 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0129-82-R:** Service Employees International Union, Local 183, A.F. of L., C.I.O., C.L.C., (Applicant) v. The Peterborough Humane Society, (Respondent).

Unit: "all employees of the respondent at Peterborough, Ontario, save and except supervisors and foremen and persons above the rank of supervisor and foreman." (8 employees in unit). (*Having regard to the agreement of the parties*).

**0130-82-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Wark Milk Transport Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of Port Elgin, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week." (10 employees in unit). (*Having regard to the agreement of the parties*).

**0140-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. J. & B. Excavating Company, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands such thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northerumberland, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0141-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Stan Vine Construction Inc., (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 2405 Finch Avenue West, Weston, Ontario, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation periods." (2 employees in unit). (*Having regard to the agreement of the parties*).

**0152-82-R:** P. V. Trim Worker's Association, (Applicant) v. P. V. Trim Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the summer vacation period." (195 employees in unit).

**0154-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Voga Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0155-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. T. Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0156-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Belmonte Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0157-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Beira Alta Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that Portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0158-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. P. F. Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that Portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0159-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. J. R. Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial,



commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0160-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Azores Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0161-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. 483392 Ontario Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0162-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Marzio Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0163-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Ferjo Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank non-working foreman." (3 employees in unit).

**0164-82-R:** Construction Workers Local #6 Affiliated with the Christian Labour Association of Canada, (Applicant) v. Harm Schilthuis and Sons Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting collective agreement between the applicant and The Independent Contractors Association." (2 employees in unit).

**0167-82-R:** Local 47 Sheet Metal Workers' International Association, (Applicant) v. Nicholson Sheet Metal Works Ltd., (Respondent).

Unit #1: "all sheet metal workers and sheet metal workers' apprentices in the employ of the respondent

in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all sheet metal workers and sheet metal workers’ apprentices in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**0171-82-R:** Ontario Nurses’ Association, (Applicant) v. H. J. McFarland Memorial Home, (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Hallowell, Ontario save and except the director of nursing, persons above the rank of director of nursing, and nurses employed for not more than twenty-four (24) hours per week.” (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent in the Township of Hallowell, Ontario, who are regularly employed for not more than twenty-four (24) hours per week, save and except the director of nursing, and persons above the rank of director of nursing.” (5 employees in unit). (*Having regard to the agreement of the parties*).

**0189-82-R:** International Association of Machinists and Aerospace Workers, (Applicant) v. Carr-Tech Services Limited, (Respondent).

Unit: “all employees of the respondent at its plant at 450 Tapscott Road, Unit 1, Scarborough, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (25 employees in unit). (*Having regard to the agreement of the parties*).

**0192-82-R:** International Brotherhood of Painters and Allied Trades — Local 1891, (Applicant) v. Gallace Painting & Decorating Co. Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional and residential sectors, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**0213-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Eurocan Contractors Inc., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

Unit #2: “all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (12 employees in unit).

**0214-82-R:** Ontario Public Service Employees Union, (Applicant) v. Kingston General Hospital, (Respondent).

Unit: "all employees of the respondent at Kingston, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except chief technologists and supervisors, persons above the rank of chief technologist and supervisor, personnel department staff and persons covered by subsisting collective agreements between the respondent and the Ontario Nurses' Association, Ontario Public Service Employees Union, Canadian Union of Public Employees and the Association of Allied Health Professionals." (11 employees in unit). (*Having regard to the agreement of the parties*).

**0228-82-R:** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bioshell Inc., (Respondent) v. Canadian Paperworkers Union, (Intervener).

Unit: "all employees of the respondent in Hearst, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in unit).

**0230-82-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Durwes Contracting Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

**0231-82-R:** Labourers' International Union of North America, Local 527, (Applicant) v. V.N.M. Construction and Formwork Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0237-82-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Angelbort Painting & Decorating Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).



**0241-82-R:** The International Association of Machinists and Aerospace Workers, (Applicant) v. Schwarzkopf Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (41 employees in unit). (*Having regard to the agreement of the parties*).

**0246-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Jacobson Elevator Builders Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0277-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Blenkhorn and Sawle Limited, (Respondent).

Unit: "all employees of the respondent working in St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and persons covered by subsisting collective agreements." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0279-82-R:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) Holiday Inn of Toronto — Downtown of the Commonwealth Holiday Inns of Canada Limited, (Respondent).

Unit: "all employees of the respondent at 89 Chestnut Street in Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, front desk staff, security staff and persons covered by a subsisting collective agreement." (52 employees in unit). (*Having regard to the agreement of the parties*).

**0285-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. G. B. Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0286-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Euro Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0312-82-R:** United Food and Commercial Workers International Union, Local 725, (Applicant) v. Mmmuffins Inc., (Respondent).

Unit: "all employees of the respondent at its French Bakery & Cafe, Eaton Centre, Toronto, save and

except assistant manager, persons above the rank of assistant manager, the head baker, and students employed during the school vacation period.” (55 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0331-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, (Applicant) v. Capital Paving Limited, (Respondent).

Unit #1: “all truck drivers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

Unit #2: “all truck drivers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen.” (15 employees in unit).

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2198-81-R:** International Woodworkers of America, (Applicant) v. Laurentian Wood Inc., (Respondent).

Unit: “all employees of the respondent in the Township of Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four hours per week.” (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6

**2530-81-R:** Canadian Paperworkers Union, (Applicant) v. Abitibi-Price Fine Papers a division of Abitibi-Price Inc., (Respondent) v. United Paperworkers International Union, (Intervener).

Unit: “all employees of the respondent at the Thunder Bay Division, Thunder Bay, Ontario, save and except salaried foremen, supervisors, persons above the rank of salaried foreman and supervisor, watchmen, collective agreements between the respondent and Canadian Paperworkers Union, Local 239, International Brotherhood of Electrical Workers, Local 1565, International Union of Operating Engineers, Local 865 and Office and Professional Employees International Union, Local 236.” (305 employees in unit). (*Having regard to the agreement of the parties*) (*Clarity Note*).

Number of names of persons on list as originally prepared	302
Number of persons who cast ballots	205
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	142
Number of ballots marked in favour of intervener	111
Number segregated and not counted	1

**2574-81-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Tamarron Group Inc., (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in the cement finishing, water proofing and

restoration work in the employ of (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, water proofing and restoration work in the employ of (a) D. R. McCormick Electric Limited, or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in all other sectors in the District of Kenora including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (88 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	83
Number of persons who cast ballots	75
Number of segregated ballots cast by persons whose name appear on voters' list	75

**2627-81-R:** Canadian Paperworkers Union, (Applicant) v. Abitibi-Price Inc., (Respondent) v. United Brotherhood of Carpenters & Joiners of America LU2827, (Intervener).

Unit: "all employees of the respondent at its Northern Wood Preservers Division in Thunder Bay, employed in the plant and yard, save and except foremen, persons above the rank of foreman, and persons covered by subsisting collective agreement." (323 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	323
Number of persons who cast ballots	200
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	162
Number of ballots marked in favour of intervener	35

**2652-81-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Barnett-McQueen Construction Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora, including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman." (6 employees in unit).

Number of names of persons on revised voters list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0

**2653-81-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Clow Darling Plumbing & Heating Ltd., (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the



District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (8 employees in unit).

Number of names of persons on revised voters list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener	2	

**2706-81-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Sillman Company (Construction) Limited, (Respondent) v. Lumber and Sawmill Workers’ Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the name in full in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		15
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant	14	
Number of ballots marked in favour of intervener	0	

**2725-81-R; 2726-81-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Gateway Building & Supply Ltd., (Respondent) v. Lumber and Sawmill Workers’ Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora, including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (5 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	9	
Number of ballots marked in favour of intervener	2	

**2727-81-R:** Service Employees International Union A.F. of L.-C.I.O.-C.L.C., (Applicant) v. Sunnybrook Hospital, (Respondent)

brook Hospital, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, professional, administrative and paramedical staff, office and clerical staff, students taking formal courses leading to their certification both graduate and undergraduate, and persons covered by subsisting collective agreements.” (329 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		330
Number of persons who cast ballots	136	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	126	
Number of ballots marked against applicant	7	
Ballots segregated and not counted	1	

**0034-82-R:** The International Brotherhood of Electrical Workers, Local 773, (Applicant) v. 231108 Plumbing and Heating Limited, (Respondent) v. Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Intervener).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Counties of Essex and Kent, on April 16th, 1982, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Number of names of persons on list as originally prepared		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	2	

**0054-82-R:** United Steelworkers of America, (Applicant) v. Fireco Inc., (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, and students employed during the school vacation period." (67 employees in unit) (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		65
Number of persons who case ballots	47	
Number of ballots marked in favour of applicant	42	
Number of ballots marked against applicant	5	

## Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**0025-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sarnia Concrete Products Limited, (Respondent).

Unit: "all employees of Sarnia Concete Products Ltd. at Sarnia, save and except foremen and persons above the rank of foreman, office and sales staff and persons covered by a subsisting collective agreement between Sarnia Concrete Products Ltd. and the International Hod Carriers, Building and Common Labourers' Union of America, Local 1089." (5 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of Christian Labour Association of Canada	0	

## Applications for Certification Dismissed — No Vote Conducted

**1033-81-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Monte Carlo Carpentry, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

**0028-82-R:** United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., (Applicant) v. J. J. Derma Meats Limited, (Respondent) v. Group of Employees, (Objectors).

**0182-82-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Applicant) v. Tref Construction Inc., (Respondent).

**0240-82-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757, Thunder Bay, of the Hotel Employees and Restaurant Employees International Union, A.F.L.-C.L.C., (Applicant) v. Shoreline Motor Hotel, Ronscott Inc., (Respondent).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2542-81-R:** Graphic Arts International Union, Local 542, (Applicant) v. Screen Print Display Advertising Limited, (Respon (Respondent) v. The Employees' Association of Screen Print Display Advertising Ltd., (Incumbent).

Unit: "all employees of the Respondent at its plant at 100 Elgin Street in the City of Brantford, save and except foremen/forewomen, office, creative and sales staff, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (101 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	85
Number of persons who cast ballots	79
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	47

**2567-81-R; 2572-81-R; 2573-81-R; 2574-81-R:** Labourers' International Union of North America, Local 607, (Applicant) v. D. R. McCormick Electric Limited, Clow Darling Mechanical Contractors Ltd., Tamarron Construction Limited, Tamarron Group of Inc., T-2 Rentals Limited, (Respondents).

Unit: "all construction labourers and all employees engaged in the cement finishing, water proofing and restoration work in the employ of (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, water proofing and restoration work in the employ of (a) D. R. McCormick Electric Limited, or (b) Clow Darling Mechanical Contractors Ltd., or (c) Tamarron Construction Limited, or (d) Tamarron Group Inc., or (e) T-2 Rentals Limited in all other sectors in the District of Kenora including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (88 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	83
Number of persons who cast ballots	75
Number of segregated ballots cast by persons whose name appear on voters' list	83

**2586-81-R:** Labourers' International Union of North America Local 506, (Applicant) v. P & R Concrete Finishing Co., Div. of 361780 Ontario Limited, (Respondent) v. O.P. & C.M.I.A. Local 598, (Intervener).

Unit: "all working foremen, journeymen and apprentices cement masons and waterprooferers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen and apprentice cement



masons and waterproofers in the employ of the respondent in all other sectors in The Municipality of Metropolitan Toronto, the Regional Municipality of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham.” (12 employees in unit).

**2601-81-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Richard Lundstrom Construction Inc., (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foremen.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2621-81-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Janod Ltd., (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, co-mercial and instutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (36 employees in unit). (*Having regard to the agreement of the parties*).

**2636-81-R:** Ontario Public Service Employees Union, (Applicant) v. Grandview Medical Laboratories: A Division of Canadian Medical Laboratories Limited, Cyto-Med Laboratory: A Division of Canadian Medical Laboratories Ltd., and Brant Medical: A Division of Canadian Medical Laboratories Limited, (Respondent).

Unit: “all employees of the Respondent at Cambridge and Brantford, Ontario save and except Assistant Manager, persons above the rank of Assistant Manager, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (32 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		25
Number of persons who cast ballots		25
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	18	

**2651-81-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Thunder Bay Harbour Improvements Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunday Bay, the District of Rainy River, and the District of Kenora including the patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons who cast ballots		9
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener	5	

**2656-81-R:** Labourers' International Union of North America, Local 607, (applicant) v. Kamtar Construction Ltd., (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other secotrs in the District of Thunder Bay, save and except non-working formen, and persons above the rank of non-working foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots		4
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	2	

**2699-81-R:** International Woodworkers of America, (Applicant) v. Goldcrest Furniture Ltd., (Respondent) v. Canadian Union of Industrial Employees, (Intervener).

Unit: "all employees of the respondent in its furniture division at Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (212 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		214
Number of persons who cast ballots		218
Number of spoiled ballots	8	
Number of ballots marked in favour of applicant	65	
Number of ballots marked in favour of intervener	143	
Ballots segregated and not counted	2	

## Applications for Certification Dismissed Subsequent to a Post Hearing Vote

**1720-81-R:** The Hotel, Restaurant and Cafeteria Employees Union, Local 75 of the Hotel Employees and Restaurant Employees International Union (A.F.L.-C.L.C.-C.I.C.), (Applicant) v. The Constellation Hotel, (Respondent).

Unit: "all employees of therrespondent at the Constellation Hotel, Rexdale, Ontario save and except supervisors, persons above the rank of supervisors, office and sales staff, including front desk staff, accounting and audit department staff, banquet staff, persons employed for not more than 24 hours per week and students employed during the summer vacation period." (275 employees in unit).

Number of names of persons on revised voters' list		235
Number of persons who cast ballots		198
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	83	
Number of ballots marked against applicant	92	
Ballots segregated and not counted	21	

**2496-81-R:** Labourers' International Union of North America Local 506, (Applicant) v. Ellis-Don Limited, (Respondent) v. Operative Plasterers & Cement Masons' International Assoc. Local 598, (Intervener).

Unit: "all working foremen, journeymen, apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all working foremen, journeymen, apprentice cement masons and waterproofers engaged in all other secotrs in the Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	4

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2203-81-R:** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. TNT Courier/Air Express, (Respondent).

**2546-81-R:** Canadian Union of Public Employees, (Applicant) v. Durham Board of Education, (Respondent).

**0094-82-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93, (Applicant) v. Dial Construction Limited, (Respondent).

**0100-82-R:** United Steelworkers of America, (Applicant) v. Kenoyd Limited, (Respondent).

**0166-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mastercraft Development Corporation, (Respondent).

**0170-82-R:** Service Employees International Union, Local 268, (Applicant) v. St. Joseph's Heritage, (Respondent).

**0216-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. United Pumps of Canada Limited, (Respondent).

**0255-82-R:** General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. Orion Forming Limited, (Respondent) v. Labourers' International Union of North America, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).

**0256-82-R:** General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. Right Forming Limited, (Respondent) v. Labourers' International Union of North America, (Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).



**0257-82-R:** General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. Dilvar Construction Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).

**0269-82-R:** United Plant Guard Workers of America Local 1962, (Applicant) v. Ontario Jockey Club, (respondent).

**0307-82-R:** Canadian Union of Public Employees, (Applicant) v. City of Ottawa, (Respondent).

**0308-82-R:** Canadian Union of Public Employees, (Applicant) v. Cornwall General Hospital, (Respondent).

**0317-82-R:** United Food and Commercial Workers International Union affiliated with the Canadian Labour Congress, AFL-CIO, (Applicant) v. American Can Canada Inc., (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1718-81-R; 1719-81-R:** United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Plastics CMP Limited and 474686 Ontario Ltd., (Respondent). (*Withdrawn*).

**2001-81-R:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 363326 Ontario Limited carrying on business as the Craftsman's Circle, and 464173 Ontario Limited, (Respondents). (*Dismissed*).

**0201-82-R; 0202-82-R:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ranadae Development Corporation Limited; and Danar Development Company Limited, (Respondents). (*Granted*).

## SALE OF A BUSINESS

**1680-81-R:** International Ladies Garment Workers' Union, (Applicant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

**1860-81-R:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 487098 Ontario Limited and Mandic Bros. Drywall and Const. Ltd., (Respondents). (*Dismissed*).

**0201-82-R; 0202-82-R:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ranada Development Corporation Limited; and Danar Development Company Limited, (Respondents). (*Granted*).

**1718-81-R; 1819-81-R:** United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Plastics CMP Limited, and 374686 Ontario Ltd., (Respondents). (*Dismissed*).

**2235-81-R; 1719-81-R:** United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Plastics CMP Limited, and 374686 Ontario Ltd., (Respondents). (*Dismissed*).

**2235-81-R:** International Brotherhood of Electrical Workers, Local 120, (Applicant) v. S.H. Myles & Company Limited and Forest City Electric Limited and MSC (Myles) Inc., (Respondents). (*Granted*).

**2077-81-R:** International Ladies' Garment Workers' Union, (Applicant) v. Josh Industries Incorporated and L. Davis Textiles Co. Limited, (Respondent). (*Dismissed*).

**2282-81-R:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Orazio D'Alisi Masonry and Countryside Masonry Ltd., (Respondents). (Respondents). (*Granted*).

**2523-81-R:** Toronto-Central Ontario Building and Construction Trade Council (formerly known as The Building and Construction Trades Council of Toronto and vicinity), (Applicant) v. M. J. Guthrie Construction Limited Rosedale Construction, (Respondent). (*Dismissed*).

**2731-81-R:** International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. Captain Developments Limited, carrying on business as Beverley Hills Motor Hotel, (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1783-81-R:** Antonio Fiorenza & Ron Mansolini, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent) v. National Dry Company Limited, (Intervener).

Unit: "all employees employed at or working at its plant at Metropolitan Toronto, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office staff." (32 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots		25
Number of ballots marked in favour of respondent	3	
Number of ballots marked against respondent	22	

**2081-81-R:** Diane Bligh and Gail Wright, on behalf on a group of employees of the Canadian Union of Public Employees, (Applicant) v. The Office and Professional Employees International Union, Local 491, (Respondent).

Unit: "all permanent full-time and permanent part-time employees of the Canadian Union of Public Employees (CUPE) in Ontario doing office and clerical work, hired for a period of 15 hours a week or more whose duties fall within the classification listed in "Schedule "A" of the collective agreement between the respondent and CUPE, save and except employees covered by the agreements between CUPE and the Administrative and Technical Staff Union, Units "A" and "B", and the Canadian Staff Union." (130 employees in the unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		68
Number of names of persons on revised voters' list		67
Number of persons who cast ballots	65	
Number of spoiled ballots	01	
Number of ballots marked in favour of respondent	38	
Number of ballots marked against respondent	25	
Ballots segregated and not counted	01	

**2276-81-R:** Arden McGee, (Applicant) v. Teamsters' Local Union 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Respondent) v. Northumberland Ready Mix Ltd., (Intervener).

Unit: "all employees of Northumberland Ready Mix Ltd. working at Hastings, Ontario, the County of Northumberland, save and except foremen, those above the rank of foremen, office and sales staff." (3 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared		3
Number of persons who cast ballots		3
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**2331-81-R:** Arthur Wilkinson, (Applicant) v. United Food & Commercial Workers Local 633, AFL. CIO. CLC., (Respondent) v. Vounclair Meats Limited, (Intervener).

Unit: "all employees of the intervener employed at Metropolitan Toronto, the County of York and the Township of Chinguacousy, save and except foremen, persons above the rank of foreman, and office staff." (10 employees in the unit). (*Dismissed*).

Number of names of persons on list as originally prepared		7
Number of persons who cast ballots		6
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	1	

**2449-81-R:** Ian C. Craig, (Applicant) v. Canadian Paperworkers Union C.L.C. (Office Workers), (Respondent) v. SPB Canada (1979) Inc., (Intervener).

Unit: "all office and clerical employees of SPB Canada (1979) Inc. in Belleville, save and except supervisors, persons above the rank of supervisor, salesman and sales trainees, Secretary to the Plant Manager, industrial relations assistant, students employed during the school vacation period and persons covered by a subsisting collective agreement between SPB Canada (1979) Inc. and Canadian Paperworkers Union Local 1335. (7 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared		7
Number of persons who cast ballots		7
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**2478-81-R:** Myrtle Swift, Linda Schweier, Helen Hughes and Joan Robbins, (Applicant) v. Service Employees' International Union, Local 183, (Respondent) v. K-Mart Canada Ltd., (Intervener).

Unit: "all employees of K-Mart Canada Limited (Peterborough), employed at its K-Mart store in the City of Peterborough, save and except department managers, persons above the rank of department manager, management trainees, pharmacist, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (75 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		75
Number of names of persons on revised voters' list		74
Number of persons who cast ballots	67	
Number of ballots marked in favour of respondent	13	
Number of ballots marked against respondent	54	

**2509-81-R:** Piara Upal, on his own behalf and on behalf of a group of employees, (Applicant) v. United Steelworkers of America, (Respondent) v. Dundas Jafine Industries Limited, (Intervener).

Unit: "all employees of Dundas Jafine Industries Limited in Metropolitan Toronto, save and except



foremen, persons above the rank of foreman, office and sales staff." (6 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	15	
Number of ballots marked in favour of respondent	6	
Number of ballots marked against respondent	9	

**2591-81-R:** Eugene Harris & Greg Esson, (Applicant) v. Bob Martin (Chemical, Energy & Allied Workers Local 424, (Respondent) v. Tarcan Distribution a Division of Tarett Inc., (Intervener).

Unit: "all employees in the Mississauga, Ontario warehouse, save and except foremen, those above the rank of foreman and office staff." (2 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		02
Number of persons who cast ballots	02	
Number of persons marked in favour of respondent	00	
Number of ballots marked against respondent	02	

**2630-81-R:** Barb. Ciach, Don. Embleton, Laila Owen and Keith Taylor, (Applicant) v. United Electrical, Radio and Machine Workers of America, Local 520, (Respondent) v. Inglis Limited, (Intervener).

Unit: "all employees of Inglis Limited at 324 Hilton Drive, Stoney Creek, Ontario, save and except supervisors, persons above the rank of supervisor, partsman, and sales staff." (4 employees in the unit). (*Granted*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**2654-81-R:** Rober J. Campion, (Applicant) v. United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., Local 617P, (Respondent) v. Muller's Meats Ltd., (Intervener).

Unit: "all employees of the intervener in the City of Niagara Falls save and except foremen, head shipper, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (38 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		38
Number of persons who cast ballots	30	
Number of ballots marked in favour of respondent	08	
Number of ballots marked against respondent	22	

**2680-81-R:** Wendy Murphy on behalf of the Office Staff and Clerical Workers of Port Colborne Quarries Limited, (Applicant) v. United Steelworkers of America, (Respondent) v. Port Colborne Quarries Limited, (Intervener).

Unit: "all office and clerical workers of Port Colborne Quarries Limited in Port Colborne, save and except supervisors and persons above the rank of supervisor." (3 employees in the unit). (*Granted*).

**0015-82-R:** Employees of The Corporation of the County of Grey, (Applicant) v. Canadian Union of Public Employees and its Local 1530, (Respondent) v. Corporation of the County of Grey, (Intervener).

Unit: "all office, technical and clerical employees of the Corporation of the County of Grey save and except Deputy Clerk-Treasurer, the Payroll Clerk/Bookkeeper, the Safety Inspector, the Weed Inspector, the Private Secretaries to the Clerk-Treasurer and the Engineer, Engineering Technicians, Construction Manager, Senior Technicians, persons employed in the Museum, persons employed in the Homes for the Aged and persons regularly employed for less than twenty-four (24) hours per week." (22 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	22
Number of names of persons on revised voters' list	21
Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots marked in favour of respondent.	06
Number of ballots marked against respondent	13

**0057-82-R:** Halton Centennial Manor Employees Re: Mary I. Carrigan, (Applicant) v. Canadian Union of Operating Engineers and General Workers, (Respondent) v. Group of Employees, (Objectors). (244 employees in unit). (*Dismissed*).

**0112-82-R:** Elaine M. Simpson, Dennis L. Cornell, Paul Taylor, Thoi Hue Tran, Nhi Hue Tan, Otto Nungesser, (Applicants) v. Commercial Workers' Union, Local 486, (Respondent) v. Hofmann Balancing Techniques Ltd., (Intervener). (13 employees in unit). (*Dismissed*).

**0174-82-R:** Dan B. La Rose, (Applicant) v. United Steelworkers of America, (Respondent) v. Arcweld Products Limited, (Intervener). (4 employees in unit). (*Granted*).

**0203-82-R:** Joseph Steffler, (Applicant) v. United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent). (9 employees in unit). (*Granted*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**2622-81-M:** Corporation of the City of Sarnia, Marshall Gowland Manor, (Employer) v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Trade Union). (*Granted*).

**2623-81-M:** York University, (Employer) v. International Union of Operating Engineers, Local 796, (Trade Union). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (Construction Industry)

**0288-82-U:** The Metropolitan Toronto Apartment Builders' Association, (Applicant) v. The Toronto Building & Construction Trades Council, the International Brotherhood of Electrical Workers, The I.B.E.W. Construction Council of Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors' Association of Ontario, (Respondents). (*Withdrawn*).

**0341-82-U:** Regional Municipality of Niagara, (Applicant) v. Frank Fazzari, George Gulilmi, James Rados, Gordon Troke, et al, (Respondent). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1043-81-U:** United Cement, Lime & Gypsum Workers International union. (Complainant) v. Plastics CMP Limited, Barry J. Lawrence Management Ltd., 440172 Ontario Limited, and 374686 Ontario Ltd., (Respondent). (*Granted*).

**1347-81-U:** Guiseppe Brundia, Donald Pye, Russel Spotton, Lawrence Ozzard, Gruliano Mior, Martin Parent, Robert Morris, Ilias Kottaras, George Haralampous, Chris Silver, James Millar, Robert Shorten and Leslie McBean, (Complainants) v. Teamsters Union Local 879, and Teamsters Union Local 938, (Respondents) v. Softley Cartage Limited and Donline Haulage Ince., (Interveners). (*Dismissed*).

**1356-81-U:** Softley Cartage Ltd., or Donline Haulage Employees, (Complainants) v. Teamsters Union Local #938 and #879 (Donline Haulage and Softley Cartage Ltd., (employers), (Respondents). (*Dismissed*).

**1681-81-U:** International Ladies Garment Workers' Union, (Complainant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Granted*).

**2184-81-U:** Rudolph Montrose Henry, (Complainant) v. International United United Automobile Aerospace & Agricultural Implement Workers of America, and its Local Union #252 and Caterpillar of Canada Ltd., (Respondents). (*Granted*).

**2206-81-U:** Labourers' International Union of North America, Local 183, (Complainant) v. 7-11 Pools & Metalfab Limited, (Respondent). (*Withdrawn*).

**2323-81-U:** United Brotherhood of Carpenters and Joiners of America Local 1256, (Complainant) v. K. Blok Anderson Limited, (Respondent). (*Withdrawn*).

**2400-81-U:** Generald Patrick O'Sullivan, (Complainant) v. The Teamster's Union Local 419, (Respondent) v. Toronto Humane Society, (Intervener). (*Dismissed*).

**2405-81-U:** Canadian Union of Public Employees and its Local 543.4, (Complainant) v. South Western Regional Library, (Respondent). (*Withdrawn*).

**2419-81-U:** Giovanni Moscarelli, (Complainant) v. United Steelworkers of America, Local 3335, (Respondent). (*Withdrawn*).

**2563-81-U:** Victor Alvarado, (Complainant) v. Stedman's Employees Association, (Respondent) v. Stedmans — Division of MacLeod Stedman Limited, (Intervener). (*Granted*).

**2576-81-U:** The International Brotherhood of Painters and Allied Trades; the Ontario Council of the International Brotherhood of Painters and Allied Trades; and The International Brotherhood of Painters and Allied Trades, Local 1891, (Complainants) v. Brunswick Drywall Ltd. and The International Union of Bricklayers and Allied Craftsmen and its Local 10; and The Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen, (Respondents). (*Dismissed*).

**2579-81-U:** Parin Kasmani, (Complainant) v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1915, (Respondent) v. Northern Telecom Canada Limited, (Intervener). (*Dismissed*).



**2610-81-U:** William Johnson, (Complainant) v. All-Way Transportation Services Limited, (Respondent). (*Withdrawn*).

**2633-81-U:** Shirley Thyssen, (Complainant) v. Office & Professional Employees International Union, Local #473, (Respondent #) v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent #2). (*Dismissed*).

**2635-81-U:** Terrance Bryant, (Complainant) v. United Steelworkers of America, (Respondent) v. North American Steel Equipment Company Ltd., (Intervener). (*Dismissed*).

**2655-81-U:** Claude Lanthier and Peter Kirow, (Complainants) v. All-Way Transportation Services Limited, (Respondent). (*Withdrawn*).

**2649-81-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Rosen Ruels Limited, (Respondent). (*Withdrawn*).

**2692-81-U:** Samuel T. Smith, (Complainant) v. Millwright District Council, (Respondent). (*Withdrawn*).

**2702-81-U:** Les Fowlston, (Complainant) v. All-Way Transportation Services Limited, (Respondent). (*Withdrawn*).

**0042-82-U:** James Barclay & Andrew Robb, (Complainants) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, (Respondent). (*Withdrawn*).

**0066-82-U:** United Food and Commercial Workers International Union, A.F.L. - C.I.O. - C.L.C., (Complainant) v. J. J. Derma Meats Limited, (Respondent). (*Withdrawn*).

**0078-82-U:** Claude Cadieux, (Complainant) v. International Mill Services, (Respondent). (*Withdrawn*).

**0089-82-U:** Don Ross, (Complainant) v. Cupe Local #66, (Respondent). (*Withdrawn*).

**0101-82-U:** United Steelworkers of America, (Complainant) v. Kenoyd Limited, (Respondent). (*Withdrawn*).

**0115-82-U:** Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Complainant) v. Diana Sweets Ltd., (Respondent). (*Withdrawn*).

**0117-82-U:** Elizabeth Randall, (Complainant) v. International Brotherhood of Electrical Workers, Local 1590, (Respondent). (*Withdrawn*).

**0120-82-U:** George Maillet, (Complainant) v. A.A.E. Ltd., (Respondent). (*Withdrawn*).

**0131-82-U:** Samuel Smith, (Complainant) v. Mr. Tom Cope B.A. Local 1151, (Respondent). (*Withdrawn*).

**0137-82-U:** Jack Davidson, (Complainant) v. (1) Teamsters Local Union #419, (2) Martin Brower Canada Ltd., (Respondents). (*Withdrawn*).

**0173-82-U:** Canadian Union of Public Employees, (Complainant), v. River Glen Haven Nursing Home and Owner Tom Kannampusha, (Respondent). (*Withdrawn*).

**0178-82-U:** Graham S. MacKinnon, (Complainant) v. C. N. Tower (Re: S. Tughan), (Respondent). (*Withdrawn*).

**0183-82-U:** Ontario Nurses' Association, (Complainant) v. Brouillette Manor Limited, (Respondent). (*Withdrawn*).

**0186-82-U:** Michael Iamundo, (Complainant) v. Bakery, Confectionery & Tobacco Workers International Union, Local 264, and A & P Bakery, (Respondents). (*Withdrawn*).

**0187-82-U:** Bozo Tojcic, (Complainant) v. United Brotherhood of Carpenters & Joiners of America (Lake Ontario District Council), (Respondent). (*Withdrawn*).

**0188-82-U:** Christian Labour Association of Canada, (Complainant) v. Nik-Nak Food Mart, Dresden K Store, (Respondent). (*Withdrawn*).

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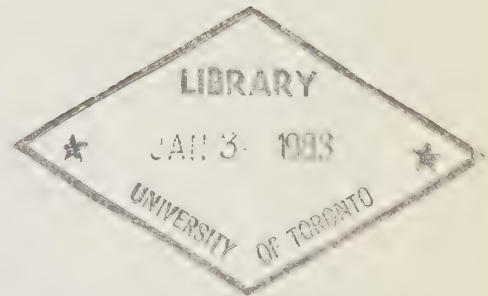
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**2390-81-M Local 47, Sheet Metal Workers' International Association, Applicant, v. Albert's Siding, Respondent.**

**Construction Industry Grievance – Two brothers engaged in doing siding work on various projects – Purporting to sign recognition agreement with union – Board finding brothers not employer but employees – Recognition agreement not valid – Not bound by provincial collective agreement**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

***APPEARANCES:** Denis Power and Bob Belleville for the applicant; Richard R. Marks for the respondent.*

**DECISION OF VICE-CHAIRMAN IAN SPRINGAGE AND BOARD MEMBER J. WILSON; July 8, 1982**

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. On agreement of the parties, the only issue dealt with to date is whether the respondent is bound to the current Sheet Metal Workers' provincial agreement. The legal issue is a narrow one, but the facts are, to say the least, unusual.

2. Albert's Siding is the name under which Leslie and Richard Albert, two brothers, have for the past two and a half years engaged in the installation of siding in the Ottawa area. Leslie and Richard described themselves as partners, although in many respects they appear to have functioned more as a "team of employees" rather than as a partnership firm. Save apparently for one isolated instance, the brothers have not employed others to work for them.

3. In June of 1980 the Albert brothers were retained by G. H. Meilleur and Son Limited ("Meilleur") to perform some siding work on a project on Richmond Street in Ottawa. Meilleur is a sheet metal contractor, which had obtained a contract for a sizable amount of work on the project, including the installation of some siding. Meilleur purported to sub-contract the siding work to the Alberts.

4. In 1974 Meilleur had become signatory to a collective agreement with the applicant covering sheet metal work. Due to an accreditation order issued by this Board in February, 1972, to the Mechanical Contractors Association of Ottawa ("the MCAO") Meilleur automatically became bound to a succession of collective agreements between the applicant and the MCAO. With the advent of provincial bargaining in 1978, Meilleur became bound by the terms of a provincial agreement between the Ontario Sheet Metal and Air Handling Group, on the employer side, and the Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference on the union side. At the time of the events referred to below, the provincial agreement contained the following clauses:

**"ARTICLE 8 — UNION SECURITY**

8.1 The employer agrees it shall be a condition of employment for all employees covered by the terms of this Agreement, to be a member of, and to maintain membership in good standing, in one of the local unions.



## ARTICLE 9 — SUB CONTRACTS

9.1 When subcontracting the employer agrees that any and all of the acknowledged work herein contained in the Clause covering Trade Jurisdiction in the respective Appendix must be subcontracted to an employer who is a signatory to this Provincial Agreement, providing such subcontractors are available.

## ARTICLE 21 — HIRING PROCEDURE

21.1 The Union hereby agrees to furnish at all times to the employer, duly qualified members and registered apprentices as the work requires, in such numbers as the employer shall determine to be necessary to properly execute the work he has contracted for, in the manner and under the conditions specified in this Agreement.

21.2 Whenever after reasonable notice, (48 hours) excluding Saturdays, Sundays and Holidays, the local union is unable to furnish a sufficient number of such duly qualified members and registered apprentices recognized by the Union, to meet the requirements of the employer, then the employer may secure such additional sheet metal workers from other sources as may be necessary, it being understood that they shall be eligible and shall comply with the requirements of the Union and thus become covered by the terms of this Agreement.”

5. At the time Meilleur assigned the siding work on the Richmond Street project to the Alberts, the Alberts had no connection with the applicant union. The two Albert brothers alone did all of the siding work on the project. One day in early June 1980, Mr. Ross Mitchell, the business agent of Local 47 approached the Alberts while they were working on the job. Upon becoming aware of the status of the Albert's, Mr. Mitchell advised them they would have to join the union or be removed from the job. Mr. Mitchell also advised Mr. Robert Belleville, the union's business manager, of the presence of the Alberts on the job site.

6. Mr. Belleville discussed the situation of the Albert brothers with Mr. M. Meilleur, the president of the Meilleur firm. Mr. Belleville told Mr. Meilleur, that the sub-contracting of work to the Alberts was in violation of the provincial agreement. Mr. Meilleur then telephoned Richard Albert and told him that he had been advised by the union that union men had to be on the job, and that the Alberts should straighten the matter out with the union.

7. On June 12, 1980, Leslie Albert went to see Mr. Belleville at the union's office. At that time Leslie signed a recognition agreement with the union which purported to bind “Albert's Siding” [sic] to the terms of the provincial agreement. As already indicated, when the document was signed by Leslie, the Alberts did not have or expect to have anyone working for them, and neither of the Alberts was a member of the trade union. In these circumstances, the preamble to the recognition agreement which is set out below, was entirely misleading:

“WHEREAS the Union has demonstrated to the Employer, that it is the exclusive bargaining agent of all of the employees in the employ of the employer in the Province of Ontario at the present time, in the geographic area of Local Union No. 47.

AND WHEREAS the Union and the Employer have agreed that the Employer employs members of the Union as employees in the Province of Ontario at the present time, in the geographic area of Local Union No. 47.

AND WHEREAS for the purpose of recognizing the Union as the exclusive bargaining agent of all of the employees of the Employer, the Union and the Employer are desirous of entering into this agreement."

8. When Leslie Albert signed the recognition agreement, both he and Mr. Belleville understood that Richard Albert would come in later to also sign the document. Mr. Belleville testified that he felt that having Richard sign later would simply be a formality, although in cross-examination he stated he could not recall if Leslie Albert had told him that Richard would also have to sign the document to make it binding. In these circumstances, we accept Leslie Albert's testimony that he advised Mr. Belleville that his brother would also have to sign the agreement to make it "legal".

9. After Leslie Albert signed the recognition agreement, Mr. Belleville advised him that he would have to become a member of the union to work under the provincial agreement. Leslie then signed an application for membership in the trade union. The applicant's initiation fee at the time was 1,328.00, normally payable by way of an initial payment of \$75.00 and by monthly deductions from a member's pay of \$60.00, in addition to the regular \$15.00 monthly fees. Mr. Belleville testified that Leslie did not pay any money towards his initiation fee at the time he signed the application for membership because he did not have the money on him. Leslie Albert testified that he did not pay any money because he felt he should first "resolve" the matter with his brother, and that he so advised Mr. Belleville at the time. Before Leslie Albert left the union office Mr. Belleville gave him a number of reporting sheets, on which contributions to welfare, pension and training funds established under the provincial agreement are to be noted by an employer when he forwards the appropriate sums to the funds.

10. Richard Albert did not sign the recognition agreement for some time. It appears that only a week or so after the events of June 12, 1980 the siding work for Meilleur was completed, and the Alberts moved on to other jobs. The Alberts performed these other jobs without any reference to the provincial agreement. Leslie Albert made no payments to the union on account of dues, initiation fees, or the various funds, and no employer reporting forms were filed. Many of the jobs performed by the Albert brothers were relatively small and of short duration, and the applicant was apparently unaware of them. However, it is clear that the applicant was aware of some of the jobs they worked on, but took no steps with respect to them.

11. There was no contact between the Albert brothers and the union subsequent to Leslie's signing of the recognition agreement in June of 1980 until February of 1981. In February the Alberts obtained some work from Hans Steel on a project at Shirley's Bay near Ottawa. Hans Steel is not in contractual relations with the Sheet Metal Workers union, and indeed the Alberts had already performed a number of small jobs for Hans Steel. Sometime before the Alberts actually started work on the Shirley's Bay project, Mr. Belleville phoned Hans Steel in an attempt to persuade the company to have the Alberts abide by the terms of the provincial agreement. Hans Steel did not discuss the matter with the Alberts, but Mr. Belleville did phone Leslie Albert to advise him of his call to the company. There is a good deal

of conflict concerning just what Mr. Belleville told Leslie Albert. According to Mr. Belleville he only advised Leslie that he had talked to Hans Steel about pressuring the Alberts to apply the provincial agreement. According to Leslie, however, Mr. Belleville told him that as a result of his call, if he wanted to work on the Shirley's Bay job he would have to deal with the union. Leslie testified that although he knew that Hans Steel was not a unionized company, he felt that the situation was similar to that with the Meilleur job, and that to do the work he and his brother would have to come to some arrangement with the union. Richard Albert testified that this was also his understanding of the situation, as relayed to him by his brother.

12. Counsel for the respondent contended that given the fact that the Albert brothers knew that Hans Steel was not a union firm, it is unreasonable to believe that they felt they would be required to come to some sort of an arrangement with the union in order to work on the Shirley's Bay job. Given the facts of this case, however, and particularly the conduct of Leslie and Richard Albert following Mr. Belleville's call to Leslie, we accept the testimony of the Alberts that they believed that as a result of Mr. Belleville's call to Hans Steel, they would have to reach an accommodation with the union if they were to work on the Shirley's Bay job.

13. The day after Mr. Belleville's phone call to Leslie, Leslie and Richard Albert showed up at the union's office. Richard signed the recognition agreement which Leslie had signed some eight months earlier. Richard also signed an application for membership in the union. The following day Leslie brought \$150.00 to the union as the first payment towards the initiation fee for both himself and his brother. Shortly thereafter, Leslie spoke to an official of Hans Steel who advised him that there had been no need for the Alberts to sign with the union to work on the Shirley's Bay job. The Alberts subsequently worked on the Shirley's Bay job from about April to September of 1981. During this period they made no monetary payments to the union and did not file any remittance forms. On three or four occasions Mr. Mitchell told them they would have to abide by the provincial agreement but the Alberts replied that they did not wish to have anything to do with the union. In April and May of 1981, the Alberts hired another man to work for them. This person was not hired through the union. Upon becoming aware of this situation, Mr. Mitchell told Leslie Albert that he would have to replace the new employee with a union man, to which Leslie replied that he had no intention of doing so. Leslie Albert also told Mr. Mitchell that the Alberts felt that they had been deceived into signing the recognition agreement by Mr. Belleville's comments about Hans Steel, and accordingly they did not feel bound by the agreement.

14. The Shirley's Bay job was completed in September of 1981. From there the two Albert brothers went to work on a job in Perth. The union knew about the Perth job, but made no approaches to the Alberts about it. From Perth the Alberts went to Kanata where they worked on a siding job until January of 1982. While on this job Mr. Mitchell advised them that they should apply the provincial agreement, and they in turn told him they would not do so. In February of 1982 the union filed the instant grievance alleging that from June 12, 1980, onwards Albert's Siding had refused to honor the provincial agreement. As already indicated apart from the months of April and May of 1981, the only persons who could be regarded as working for "Albert's Siding" were Leslie and Richard Albert.

15. Voluntary recognition agreements are recognized under the *Labour Relations Act*. The requirements of a recognition agreement are set out in section 16(3), which provides as follows:

"Where an employer and a trade union agree that the employer



recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.”

From this section, it is clear that a recognition agreement is a document in which an “employer” recognizes a union as the exclusive bargaining agent for “employees” in a defined bargaining unit.

16. The preamble to the document signed by the Alberts clearly indicates that the document is meant to be signed by an employer in situations where there are employees in a bargaining unit and these employees have already joined the union. In fact, however, when Leslie and Richard Albert signed the document, the only people who could have been covered by it were themselves. At the relevant time they certainly were not employers. Although, at the hearing neither party took this position, we incline to the view that the Alberts were probably not even independent contractors, but rather “employees” of the companies they worked for, albeit they were being paid on the basis of the work done. (See: *Mr. Seamless Eavestroughing, Thunder Bay Limited* [1974] OLRB Rep. Dec. 875.) As employees, the Alberts clearly could not have signed a valid recognition agreement with the trade union. If, in fact the Alberts were not employees but independent contractors, they would still have been the only people who could have been covered by the recognition agreement at the time it was signed. We are unable to accept the proposition, a person can sign a voluntary recognition agreement as an “employer”, and at the same time be an “employee” under the agreement. Accordingly, no matter whether the Alberts were employees or independent contractors, we are satisfied that the document they signed could not have been a proper recognition agreement. Further, even if it could be assumed that by applying the purported recognition agreement to the employee that they had working for them in April and May of 1981, the Alberts could have adopted or somehow ratified the recognition agreement they had signed earlier (leaving aside the fact that the employee was not a union member), it is clear that in fact the Alberts did nothing which would indicate an adoption of the agreement. Indeed, they indicated that they did not regard themselves as bound by the provincial agreement and they refused to apply the collective agreement to their employee.

17. Given our view that the alleged recognition agreement was meant to cover the very persons who as purported employers signed the document, we are of the view that the document was not a recognition agreement as contemplated by the Act and accordingly, the Alberts are not bound by the provincial agreement. In reaching this conclusion we make no comment on what the situation would have been if the Alberts had signed the recognition agreement in contemplation of subsequently hiring union members through the union, and then had in fact done so. Such simply was not the case here.

18. We have considered, but rejected, the contention of the union that any attack on the validity of the recognition agreement is untimely due to the provisions of section 60(1) of the Act and the fact that this matter was filed with the Board more than one year after both of the Alberts had signed the recognition agreement. Section 60(1) provides as follows:

“Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer

enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.”

In our view, section 60(1) has no application to the facts of this case. Firstly, we are not here dealing with an application under section 60(1). Further, section 60(1) clearly contemplates a recognition agreement between an employer and a union covering employees who would be affected by the agreement and thus might have a reason to challenge its legal validity. When the recognition agreement was entered into with the Alberts, either they were themselves employees or, if they were independent contractors, then at the time the agreement was signed and for almost all the time thereafter there were no “employees” actually covered by the agreement. For the two months that the Alberts did employ someone, the agreement was not applied to the individual involved. Indeed, there is no reason to believe that the individual was even aware of the existence of the recognition agreement. Accordingly, there was never any employee of the Alberts affected by the agreement who might have had reason to challenge its legal validity.

19. Having regard to the above, we are of the view that no recognition agreement as contemplated by the Act was entered into between the union and the Albert brothers so as to bind the Albert brothers as employers to the provincial agreement. In reaching this conclusion we would note that we are not at all impressed with the conduct of the Albert brothers, who were ready to sign an agreement when they felt it was expedient to do so but then repudiate it later. Nevertheless this does not in our view alter the fact that no legally binding recognition agreement under the Act was entered into. It goes without saying, of course, that the Albert brothers do not qualify as a firm to which employers can sublet work under article 9.1 of the provincial agreement.

20. Having regard to the fact that the Alberts are not bound to the provincial agreement, the grievance is hereby dismissed.

21. The decision of Board Member W. F. Rutherford will be forthcoming at a later date.

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**2085-81-U** Melvin Haukaas, Complainant, v. Local #1744. (Fort Frances) International Brotherhood of Electrical Workers, Respondent, v. **Boise Cascade Canada Ltd.**, Intervener.

**Duty of Fair Representation – Evidence – Unfair Labour Practice – Grievor not awarded permanent position filing grievance and contacting labour board – Removed from temporary position as well – Whether union’s refusal to assist influenced by arbitrary or improper considerations – Board discussing evidentiary onus in unfair representation proceedings**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members W. H. Wightman and B. K. Lee.

**APPEARANCES:** *Allan T. Bedard and others for the complainant; Roy Lagarie and others for the respondent; D. I. Wakely and others for the intervener.*

**DECISION OF THE BOARD;** July 20, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that Local 1744, International Brotherhood of Electrical Workers (the “IBEW”) has violated section 68 and 69 of the Act. At the hearing in this matter, the complainant abandoned his claim that the IBEW had violated section 69 and relied strictly on the alleged violation of section 68. Section 68 provides as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

2. The complainant has been employed by Boise Cascade Canada Ltd. (“the company”) in Fort Frances for approximately twenty years. For most of this time he has worked exclusively within the jurisdiction of Local 92 of the United Paperworkers International Union (the “UPIU”). In December of 1979, however, the grievor bid on and was awarded the position of spare power house operator, a job within the jurisdiction of the IBEW. It was accepted either explicitly or implicitly by all of the parties that while employed as a spare power house operator, the complainant was covered by the terms of a collective agreement between the company and the IBEW. The spare power house operator fills in whenever one of the company’s four regular operators is away from his job. Because of the intermittent nature of the work, the complainant continued to work primarily within the jurisdiction of the UPIU, and spent only part of his time within the jurisdiction of the IBEW.

3. In any month where the complainant worked in excess of 40 hours within the jurisdiction of the IBEW, \$17.50 was deducted from his pay for forwarding to the union. In November of 1981 the complainant indicated to the IBEW that he desired to become a member of the union. The response on the part of the IBEW was that in line with past practice, the complainant would only be given an IBEW application card once he obtained the position of permanent power house operator. Notwithstanding the fact that the complainant never became a member of the union, section 68 of the Act makes it clear that the IBEW was under a



duty to represent the complainant in good faith and not act in a manner that was arbitrary, discriminatory or in bad faith.

4. On November 10, 1981 the company posted a notice advertising a vacancy for a *permanent* power house operator. The posting form stated that the qualifications for the job were as follows:

“Applicants should possess the following qualifications:

Grade 12 — list post graduate  
Studies — mechanical aptitude testing (all qualifications equal to apprenticeship — including interviews).”

These qualifications were not required when the complainant applied for the relief power house operator’s job in 1979. The complainant does not have a grade 12 education.

5. The grievor was the most senior applicant for the permanent power house operator’s job. The relevant provisions of the IBEW collective agreement relating to the selection of a person to fill a vacancy are as follows:

“1102 All vacancies in jobs or positions coming under the jurisdiction of any of the AFL-CIO (CLC) unions with the which the Company has an agreement, shall be filled in the following manner:

- (a) Members of the Union having jurisdiction over the vacant job or position, whether employed by the Company or laid off, shall have priority over any other person for the job or position to be filled.
- (b) In the event members, either employed or laid off, of the Union having jurisdiction over the vacant job or position are not available, then members in good standing of other AFL-CIO (CLC) Unions with which the Company has an agreement, who have been in active service for the Company for at least one year and who are qualified (or equally as qualified as any other applicant) for the job or position to be filled, shall be given preference.
- (d) The oldest employee in point of service shall be given preference provided he has the necessary qualifications to perform the work.”

Although the point is not clear, it appears that none of the applicants applying for the position were actual members of the IBEW. Accordingly, it would appear that the grievor, being the oldest employee in point of service, should have been awarded the job provided he had the necessary qualifications to perform the work. The grievor, of course, had already been performing the same job on a part-time basis.

6. The complainant took a mechanical aptitude test along with the other applicants for the vacancy. No direct evidence was led concerning the complainant’s performance on the test. The complainant testified that the company official who administered the test advised

him that he was “in there” with the others, whereas Mr. Doug Langtry, the president of the IBEW, advised him that his information from the company was that the complainant had achieved a low score on the test.

7. The complainant was not awarded the job of permanent power house operator. Instead, on or about November 10, 1981, the job was awarded to an employee with less seniority than he. On November 30, 1981 the complainant wrote the following letter to Mr. M. O'Brien, the company's mill manager:

“Dear Marty,

I wish to inform you that I feel I have been totally discriminated against in the selection of a full time (permanent) power house operator.

I would like to know in writing and by registered mail the reasons for not selecting me as a power house operator (full time).

I feel your response is greatly important, as I have every intention to go to the Human Rights Commission and if necessary the Labour Board to air my grievance against BOTH management and Union (I.B.E.W.) if this matter is not resolved to my satisfaction.”

On November 30, 1981 the complainant also wrote the following letter to Mr. Langtry, the IBEW president:

“Dear Pres. Langtry:

I am informing the membership of the I.B.E.W. that I will be at the next regular meeting of the I.B.E.W. for the sole purpose and intent on becoming a full member of the I.B.E.W. As you are aware I have been paying ½ dues going on 2 years. I also paid the \$140.00 full assessment after last negotiations. I feel I have more than enough of my qualifying time in to become a full member.

I also wish to inform the local that I feel I am being discriminated against in the selection of a power house operator on a full time basis. As a result I request the local union clear this matter up with management immediately.

If the local union will not accept me as a full member or assist me in securing the POWERHOUSE OPERATOR job, I would like you to respond to me by registered mail giving the reason.”

8. On December 8, 1981, Mr. O'Brien responded to the complainant on behalf of the company, and in so doing denied any wrongdoing on the part of the company. On the same date, the complainant forwarded the following letter to Mr. O'Brien:

“Dear Sir:

I wish to inform you of my intent to grieve the Power House Operators job — full time.

Under the provisions of the collective agreement I feel I have been improperly treated, and as requested earlier I would like an official response to my original letter of November 30, 1981.

A letter has been sent to the Minister of Labour by me requesting assistance in my endeavours to become a permanent power house operator.

I find it difficult and awkward trying to get satisfaction on my grievance from both union and management.

Your response to my letter of November 30, 1981 and of this letter of my intent to grieve would be appreciated."

9. Notwithstanding the complainant's letter to the IBEW requesting the union's assistance in securing the permanent power house operator's position, the IBEW declined to intervene with the company on his behalf. The complainant testified that he was orally advised by Mr. Langtry that the IBEW would not be assisting him, and that the only document which the union sent to him was a copy of a letter from the company to the union indicating that it would be altering the qualifications with respect to jobs in the powerhouse. As noted above the complainant did not possess the newly set qualifications. According to the complainant, representatives of the IBEW attended meetings called by the UPIU to discuss the complainant's situation, but that at these meetings the IBEW did not support his claim to the job. The IBEW led no evidence to explain why or how it reached its decision not to support the complainant.

10. The instant complaint was filed on January 5, 1982 with the support of Mr. Allan Bedard, the President of the UPIU Local. On January 26, 1982, the company called a meeting of the complainant and, among others, the presidents of the two union locals. At this meeting the complainant was advised that the company would be removing him from his job as spare power house operator. At the meeting, Mr. C. Noonan, the company's maintenance manager made the following statement:

"We might as well get right to the point. We want to rectify a mistake that the Company made some time ago. Doug, you as the President of the IBEW — the Union which has jurisdiction over the job in question and you, Al, as an interested party, are here to hear what we have decided.

Melvin, we are going to remove you from the power house spare job. I know that this has been handled improperly but this improper handling was not intentional. The superintendent at the time you got this job did not communicate to me or the Company any of the concerns that I understand were relayed to him. Your past record when you were given this job was not properly investigated. Nothing was done until Mr. Gartstore brought it to my attention. We have discussed this on many occasions and upper management has been involved and agrees with what we have decided. We are not questioning your intelligence, character or ability. I don't want you to leave here thinking that. It is your past record that indicates that you use poor judgment and this is also apparent in things you have been involved in in your power house job — plus the



discomfort of your fellow workers. In dealing with the things you are involved with in your other job and things on your present spare power house job it doesn't make sense to leave you as a spare if your judgment is in question. This is not retaliation for your action in taking us to the Labour Board. I want you to know that. In fact, we told the Labour Board that it was our intent to remove you from this job when they were up here."

11. On January 27, 1982 Mr. Noonan wrote the following letter to the complainant:

"Dear Mr. Haukaas:

To confirm our meeting of January 26, 1982, attended by yourself, Mr. Bedard, Mr. Ossachuk, Mr. Langtry, Mr. Hampton, Mr. Murray, Mr. Hall, Mr. Gartshore and myself, you are, as of that date, relieved of your duties as a spare power operator and will revert back to your job in wood storage.

Your history as an employee both with wood storage and in the recent past as a spare powerhouse operator indicates a great degree of poor judgment on your part in dealing with Company rules and equipment.

As you are well aware, the powerhouse is largely unsupervised and its safe operation depends on the operator's good judgment. Poor decisions and disregard for the immense consequences of not following strict operating procedures are representative of potential loss of life and equipment.

In light of your record in wood storage it is questionable whether you should have been awarded the power house job in the first place. In light of your record as a spare power house operator, the Company is not in a position to continue to allow you to be responsible for the safe operation of this power generating equipment and the associated transmission of that power.

This is in no way an act of retaliation on the part of the Company due to your appeal to the Ontario Labour Relations Board.

A copy of the minutes of the above-mentioned meeting is attached for your records."

It is to be noted that the propriety of the company's action in removing the grievor from the spare power house operator's job does not form part of this complaint.

12. On cross-examination the complainant was asked a number of questions relating to his work habits and conduct in certain specified situations. By and large the complainant denied any wrong doing on his part, and neither the company nor the IBEW called any evidence to rebut the complainant's testimony. Company counsel did, however, have the complainant identify a number of maintenance shift reports which he himself had completed

as the spare power house operator. On the basis of these reports, as well as the complainants own testimony, we are led to conclude that on a number of occasions the complainant when acting as the spare power house operator did not follow proper safety procedures. For example, on one occasion he failed to notify Ontario Hydro about a power line being down so as to ensure there would be no power on the line while it was being repaired. On another occasion, the complainant on spotting a fire immediately called the fire department as opposed to contacting a company official responsible for coordinating the company's response to a fire. In that the complainant's estimate as to the location of the fire was in error, the fire department ended up receiving conflicting information as to the whereabouts of the fire. The evidence also establishes that the complainant had a sense of humor which was not appreciated by management or by many other employees. An example of this sense of humor was a suggestion on a maintenance shift report that a power line which had fallen down due to heavy icing may have fallen due to "heavy birds".

13. The evidence before us, particularly insofar as it relates to the complainant's performance of the spare power house operator's job, suggests that the company likely had justifiable cause not to award him the permanent position in the power house. The complainant did not possess the new qualifications for the position, and the company was concerned about his judgment and past performance. The instant complaint, however, is not against the company but against the union. The complainant asked the IBEW for assistance in obtaining the full time power house operators job, but failed to receive it. Can it be said in the circumstances that the IBEW failed to properly represent the complainant?

14. It is now well established that section 68 of the Act does not require that a trade union champion every employee grievance or complaint. What the section does require is that the union put its mind to the issues involved and make a good faith decision as to whether or not a matter is worthy of pursuing. The evidence demonstrates that the complainant's position was put before the IBEW. The IBEW was aware that the complainant lacked the qualifications set by the company for the permanent power house operator's job. From its communications with the complainant and its attendance at various meetings concerning his complaint, the IBEW would also have been aware of the company's concerns about the complainant's job performance. What is lacking is any direct evidence as to the quality of the IBEW's consideration of the complainant's case, and any positive evidence that it did not take into account any improper considerations when it decided not to help him. In the absence of this evidence, are we to infer on the balance of probabilities that the IBEW failed to meet the requirements of section 68?

15. The final onus of proving a violation of the Act rests with the complainant. The complainant led no positive evidence to establish that the IBEW acted in a manner that was arbitrary, discriminatory or in bad faith. The complainant established only that he asked the IBEW for assistance and that such assistance was not forthcoming. In our view, the testimony of a complainant to the effect that he asked his union for assistance and the union refused, may in certain circumstances be sufficient to establish a *prima facie* case of a breach of section 68 such as to place an evidentiary onus on the trade union to establish that its decision making process did not violate section 68. An example of this might be a situation where an employee requested the union's assistance with what appeared to be a meritorious grievance of some importance and yet the union failed to take any action. In such a situation, lacking any evidence from the trade union as to why it failed to act, one might reasonably infer that the trade union either acted arbitrarily by failing to properly put its mind to the matter, or if it did

do so its decision was motivated by bad faith or discriminatory considerations. We do not believe, however, that the complainant's case fits within this category. The facts before us, and in particular the evidence relating to the complainant's performance of the spare power house operator's job, indicates that the grievor had a relatively weak claim to the permanent position. Further, it is evident that the IBEW was aware of the problems related to the complainant's performance of the spare power house operator's job. The IBEW attended at meetings with the company called by the UPIU to discuss the complainant's case. When all of these considerations are taken into account we cannot conclude on the balance of probabilities that the IBEW's decision not to help the complainant was due to improper considerations, or an arbitrary failure to consider the matter at all, as opposed to the union considering the matter and concluding that the complainant's claim to the permanent power house operator's job was lacking in merit. This being the case, we are of the view that an evidentiary onus never did shift to the IBEW so as to require that it come forward to demonstrate that it did not violate section 68 of the Act.

16. Given our reasoning set out above, we are of the view that the complainant has not demonstrated that the IBEW violated section 68 of the Act. The complaint is accordingly dismissed.

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**2711-81-JD Camco Inc., Applicant, v. United Steelworkers of America on behalf of its Local 3129, United Steelworkers of America on behalf of its Local 7921, United Electrical, Radio & Machine Workers of America, Respondent.**

**Arbitration – Jurisdictional Dispute – Practice and Procedure – Application for alteration of unit descriptions under section 91(18) – Access to section 91(18) not dependent on conditions in section 91(1) – Whether Board deferring to arbitration.**

**BEFORE:** E.N. Davis, Vice-Chairman, and Board Members C.A. Ballentine and J.A. Ronson.

**APPEARANCES:** *B.R. Baldwin, T. Lybarger, F. Hannah and L. Turtle for the applicant; B. Shell and J. Fitzpatrick for United Steelworkers of America; H.M. Pollit, F. Piserchia, Art Jenkyn for United Electrical, Radio and Machine Workers of America (UE).*

**DECISION OF THE BOARD;** July 6, 1982

1. This is an application made under section 91(18) of the Act seeking the alteration of descriptions of apparently conflicting bargaining units in collective agreements between the applicant and the United Electrical, Radio and Machine Workers of America in one case, and the applicant and the United Steelworkers of America, in the other case. The Board issued its decision to entertain the application on May 25, 1982 and indicated that written reasons would follow. These reasons are now provided.

2. The parties are in agreement as to the following facts:



- (a) The applicant corporation was formed by the merger in February 1977 of the merger of G.S.W. Appliances Ltd. and the appliance Division of Canadian General Electric Ltd., and in July 1977, the additional merger of the Appliance Division of Canadian Westinghouse Ltd.
- (b) The instant application is concerned with the applicant's operations in Metro Toronto where the applicant operates out of a number of locations. Two of these locations were GSW operations pre-1977 and covered by collective agreements between the applicant and two Locals of the United Steelworkers, and these operations continue to be covered currently by such a collective agreement. The recognition clause in that agreement recognizes the union as "the sole collective bargaining agency for all employees in Metro Toronto, save and except guards, office and clerical workers, foremen and those above the rank of foreman". There is also a collective agreement between the United Steelworkers and the applicant in respect to office employees. This agreement is not involved in the present application.
- (c) The applicant also has a warehousing operation together with a parts sales counter and clerical support located at Don Mills. Pre-1977 this unit had been covered by a collective agreement with the United Electrical Workers as the bargaining agent. The current collective agreement with that bargaining agent recognizes "the Union as the sole and exclusive bargaining agent for all employees of the Company ..."; excluded therefrom are certain persons including office staff which are represented by the U.S.W. office and clerical agreement above referred to.
- (d) The applicant is currently realigning part of its total operations by moving certain parts supplies operations, up to now performed under the United Steelworker's agreement at the Suntract location, into the Don Mills location where the collective agreement with the United Electrical Workers has been operative.
- (e) On January 27, 1982, a letter from Mr. John Fitzpatrick on behalf of United Steelworkers to Camco stated:

'For the official record, it is the position of our Union that these jobs are bound by the collective agreement between the parties and the transfer of such jobs is within the right of the Company. However, there can be no change in the status of our members presently occupying these jobs.

As the York Mills location falls within the scope of our agreement, it is our position that our collective agreement will continue to apply to the job in question and any of our members affected by such transfer shall continue to be

members of Local Union 3129 with the full benefits and seniority provided by our collective agreement.'

- (f) On February 5, 1981, Mr. Sam Irwin of Camco responded to this letter as follows:

'As you are no doubt aware, hourly rated employees at the Company's Don Mills location are represented by United Electrical, Radio and Machine Workers of America (UE). There is, and has been, a collective bargaining relationship, at that location, between the UE and the Company for many years, now. It is the Company's position that it is bound by contractual commitment and the Labour Relations Act to recognize the UE as the bargaining agent for all employees at the Don Mills location, who fall within the scope of that Union's bargaining rights.'

- (g) On February 11, 1982, Mr. Fitzpatrick further wrote to Camco:

'It is our opinion that the Collective Agreement between Canadian Appliance Manufacturing Company Limited and the United Electrical, Radio and Machine Workers of America and its Local 514 only covers the persons occupying jobs within the Job Classification set on 25 at the time of signing of the collective agreement, that is June 27th, 1981. Any employee hired since that time must become and remain members of Local 3129 of our Union, if they are employed in Metropolitan Toronto.'

- (h) On February 25, 1982, Mr. Arthur E. Jenkyn, on behalf of the United Electrical Workers, wrote to Camco:

'The United Electrical, Radio and Machine Workers of America (UE) and its local 514 clearly possess the bargaining rights for employees of Camco at its Don Mills location, save and except those exclusions outlined in Article 1.01 of the Collective Agreement between the Company and our Union covering this location.'

Mr. Fitzpatrick's contention that our Collective Agreement is limited to those persons occupying the job classifications outlined on page 25 of the Agreement is erroneous and we expect the Company to remain in full compliance with its obligations to this Union under the Collective Agreement and, in particular, Article 1 thereof.'

- (i) On February 19, 1982, Local 3129 of United Steelworkers filed three grievances as follows:

- (1) The Union contends that the company is in violation of the C.B.A. in that persons who are not members of this Bargaining Unit, are performing work which is belong to this Bargaining Unit. Namely work contained in the Job Discriptions of Section Leader Service, Lead Hand Warranty parts Adj. Kit Preparator, Warranty Parts Adjuster, Receiver, Shipper & Parts Warehouseman, which were described, classified and agreed to as work coming within the scope of our C.B.A. and any other relevant jobs.
- (2) The Company is in violation of the C.B.A. by failing to deduct Union Dues from employees who are performing work which comes under the scope of our C.B.A.
- (3) The Union contends that the Company is in violation of our C.B.A. by contracting out work belonging to our Bargaining Unit, which was previously performed at Suntract Rd. and Monogram locations, which has caused and or prolonged a layoff of Bargaining Unit employees.

These grievances have not been referred to a Board of Arbitration and we are advised a hearing date of June 7, 1982, has been set.

3. The relief sought by the applicant is set out in its letter of March 26, 1982, to the Board, in which it is stated:

"It is the position of the Company that Article 1.01 of its Collective Agreement with the United Steelworkers of America on behalf of its Local 3129 ought to be amended to exclude those employees covered by a valid and subsisting Collective Agreement with the United Electrical, Radio and Machine Workers of America (UE) and its Local 514. It is the Company's further position that Article 1.01 of its Collective Agreement with the United Electrical, Radio and Machine workers of America (UE) and its Local 514 ought to be amended to specifically refer to employees of the Company at its Don Mills location."

4. Counsel for the applicant argued that in order for this application to be properly before the Board, it was not necessary to demonstrate that the circumstances fall within the language of section 91(1) but that section 91(18) was in itself a charging section. Counsel also argued alternatively that, in any event, the documents before the Board clearly demonstrate a claim by both Unions to do the particular work and that satisfies the provisions of section 91(1). It is further argued that it would be inappropriate for the Board to defer to arbitration in this instance where the arbitration process is solely a bi-partite process and binding only on two of the three parties having an interest; and that the relief which the applicant is now seeking is no more than a formal confirmation of the manner in which all parties have, up to now, tacitly exercised the extent of bargaining rights.

5. Counsel for the United Electrical Workers similarly argued that the Board has authority to entertain these applications under section 91(18). Counsel pointed out that there



has in the past been a mutual respecting by each Union of the “other’s baliwick” and that the alterations of bargaining unit descriptions now sought is merely a confirmation of this past mutual state of affairs.

6. Counsel for the United Steelworkers forcefully argued that the Board should exercise its discretion and defer this matter to arbitration. He argued that the issue is solely one involving the interpretation and administration of the collective agreement between United Steelworkers and the applicant, and for the Board to seize jurisdiction would be an “unwarranted intrusion into the collective bargaining process”. He responded to the applicant’s argument that any arbitration award between the United Steelworkers and the applicant would have no binding effect on the United Electrical Workers by stating that the mere fact of non-representation of the United Electrical Workers in the particular arbitration process would not in itself make any issuing award a “bad award” therefore he relied on the *Hoogendorn* case (1968) 65 D.L.R. (2d) 641 as authority for such proposition.

7. In support of his argument that this is a case in which the Board should exercise its discretion by deferring to arbitration counsel referred us to the Board’s decision in a case involving all present parties to the present application as well as two of the precursor companies. *Canadian General Company Limited*, [1978] OLRB Rep. June 501. What was involved there was an application under section 63 of the Act (section 55 as it then was) in which the present applicant sought the delimiting of the United Steelworkers bargaining rights. The Board, in that case, found that since the parties, subsequent to the sale of business, had entered into fresh collective agreements that “such problems must now be regarded as flowing from the collective agreements rather than from the sale that preceded these agreements” and went on to find that the Board did not have jurisdiction, on that application, to deal with the matter. A counsel argued that the Board in the instant application should similarly find that what is here involved is a matter of contract arbitration.

8. Counsel for the United Steelworkers argued alternatively that if the Board should decide to entertain the application on the merits that it should approach the matter from the perspective of making a bargaining unit determination based on all employees of the applicant and that such should lead to a representation vote under section 91(19).

9. Counsel were unable to refer us to any previous decision of the Board dealing with an application made under section 91(18) of the Act. The matter was raised in *Silverwood Dairies Limited* [1981] OLRB Rep. Nov. 1624 but the Board found in the particular circumstances of that case, the matter could be dealt with adequately as a complaint under section 91(1) of the Act and proceeded so to do.

10. There is also the Board decision in *Toronto Star* [1980] OLRB Rep. April 565 where an application made under section 91(18) (section 81(18) as it then was) was entertained by the Board, and resulted in the Board’s direction to amend one of the collective agreements by incorporating into it the Board’s direction in respect to the refining of certain work jurisdiction.

11. In our view section 91, read as a whole, must be interpreted in the light of the existing collective bargaining structures at the time the legislation was enacted. At least since the advent of compulsory collective bargaining, collective agreements have contained recognition clauses which may be broadly described as being of two separate types i.e. the craft

unit type and the industrial unit type. In the former, the extent of bargaining rights is considered to be co-extensive with the union's work jurisdiction, and is traditionally found in the construction industry (and in some other industries). In the latter, the extent of bargaining rights are not described in terms of the union's work jurisdiction but in terms of "all employees" irrespective of the precise nature of the work performed. For a discussion in this regard, see the Board's decision in *Harold R. Stark Company Limited*, [1982] OLRB Rep. Apr. 576.

12. Section 91(1) is particularly applicable in those instances where the bargaining rights are described in "craft-type" language and where the complaint relates to work assignments disputes. The dispute, in these cases, is predominantly "work assignment" oriented rather than representational in nature. Thus the sub-sections following section 91(1) down to section 91(17) deal with a complaint filed under section 91(1), and in several instances deal with circumstances which, while well-known in bargaining units based on craft-type language, are non-existent in bargaining units of the industrial type. We note that while section 91(1) and the following sub-sections relate to a "complaint", section 91(18) for the first time refers disjunctively to an "application". We also note that section 91(15) confers a discretion in the Board to alter bargaining unit descriptions as "defined in a collective agreement" which is similar, but not co-extensive, to the discretion conferred on the Board in section 91(18). We must, therefore, conclude that the Legislature intended section 91(18) to be a separate charging section designed primarily to provide forum for the settlement of representational disputes arising out of conflicting bargaining unit descriptions in the "industrial type" collective agreement, and access to the section is not dependent on bringing the matter within the terms of section 91(1).

13. In respect to the request by the United Steelworkers that the Board should defer to the arbitration process, we do not find the reasoning on the Board decision reported in [1978] OLRB Rep. June 501 between some of the same parties as here before us, of any relevance. In that case the Board refused to entertain the application on the grounds that the application could not be characterized as arising out of a "sale of a business". The instant case clearly appears to arise out of the description of the bargaining unit in one collective agreement conflicting with the description of the bargaining unit in another collective agreement, and the application is therefore brought within the language of the section. We also note that the relief sought by the applicant is of a nature which this Board is empowered to provide, and that arbitration boards whose function is to interpret a specific agreement, are powerless to provide such relief. We would not therefore defer to arbitration in this case.

14. As to the alternative argument made by Counsel for the United Steelworkers as to how the matter should be dealt with on the merits, we conceive it to be premature to express an opinion at this stage of proceedings.

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**0456-82-U** Canadian Paperworkers Union and its Locals 308, 309, 595, 934, 1196 and 1597, Complainants, v. **Domtar Packaging**, Respondent.

**Practice and Procedure – Unfair Labour Practice – Reverse onus not restricted to specific substantive offences – Applying to all unfair labour practices of employer affecting persons' employment – Procedure where reverse onus not applicable to some of alleged offences**

**BEFORE:** George W. Adams, Q.C., Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *Harold F. Caley and Gary Buccella for the complainants; and L. Bertuzzi and Wm. Shore for the respondent.*

**DECISION OF THE BOARD;** July 12, 1982

1. This is a complaint filed on behalf of the Canadian Paperworkers Union, its Locals 308, 309, 595, 934, 1196 and 1597, and all employees of the respondent represented by the complainants. It is alleged that the complainants have been dealt with by the respondent contrary to the provisions of sections 3, 15, 64, 66 and 70 of the *Labour Relations Act*.

2. It is useful to set out the allegations contained in the complaint. They read;

1. The Complainant and Respondent are parties to the following collective agreements:

- (a) Domtar Packaging Corrugated Containers Division Carlaw Plant and Local 308;
- (b) Domtar Packaging Corrugated Containers Division Keele Plant and Local 309;
- (c) Domtar Packaging Corrugated Containers Division Etobicoke Plant and Local 595;
- (d) Domtar Packaging Corrugated Containers Division St. Marys Plant and Local 934;
- (e) Domtar Packaging Corrugated Containers Division Kitchener Plant and Local 1196;
- (f) Domtar Packaging Corrugated Containers Division Peterborough Plant and Local 1597.

2. The Respondent operates seven (7) packaging and corrugated container divisions in the Province of Ontario. In addition to the six (6) locations listed in paragraph 1 above there is a further unorganized location at Laird Avenue in the City of Toronto.

3. The work performed at the various plants of the Respondent is inter-



changeable, and in order to avoid layoffs at the Laird Avenue Plant the Respondent has deliberately directed that orders be filled at such plant in preference to the other six plants. The reason for this is solely related to the fact that the Laird Avenue plant is non-unionized.

4. Although there have been layoffs at the six plants listed in paragraph 1 hereof there have been no layoffs at the Laird Avenue plant. The employees at the Laird Avenue plant have been told that they are guaranteed there will be no layoffs so long as there is no union.

5. The wages and working conditions for the employees at the Laird Avenue plant are in some respects superior to those of the employees at the six plants listed in paragraph 1 hereof. Once again, the employees have been told that this situation will continue to exist so long as there is no union.

6. The Carlaw Avenue plant is being closed effective September 1, 1982. This closure affects approximately one hundred members of Local 308, and is a further example of the Respondent sacrificing the union members for the unorganized employees. Indeed, contrary to Section 15 of the Act, no mention was made of a possible closure during the negotiations for the current collective agreement.

7. On April 7, 1982, Mr. G. W. Shore, Director of Employee Relations of the Respondent, when asked if he would transfer laid off employees to the Laird Avenue plant, stated words to the effect that if the person is not a trouble maker (that is, does not file a lot of grievances or make complaints) the Respondent would consider the person for employment.

8. During the week of April 12, David Welham, a foreman at the Carlaw Avenue plant, stated words to the effect that he had told the employees that if they went like Leaside (that is, non-union) the plant would still be open and would not close.

9. On March 29, Kevin Peddle, a foreman of the Respondent, stated that if the employees did not have a union here they would get the Leaside rates (that is, Laird Avenue plant).

10. Approximately one month prior to April 19, 1982, Tom Paxton, the plant manager at Keele, stated that the reason the employees at the Laird Avenue plant make the rates they do is because there is no union.

3. The relief requested is set out in Appendix "A" in the following form:

1. A declaration that the Act has been violated.
2. A direction that the Respondent cease violating the Act.
3. A declaration and direction that the Carlaw Avenue plant remain open employing members of the Complainant.

4. A declaration and direction that work is to be distributed amongst the employees in such a manner that all locations are kept working.
5. Compensation and damages to the employees affected.
6. Such other relief as may be appropriate.

4. This matter came before the Board on a preliminary matter pertaining to the Board's procedure. It was submitted by the respondent that the so-called "reverse onus" provided for by section 89(5) of the *Labour Relations Act* applied only to section 66 and section 70 and that therefore the complainants should be required to adduce evidence first with respect to all allegations of statutory violations. At the end of the case the Board would apply the different legal onuses to the various provisions. On behalf of the complainants it was submitted that particular claims based on sections 64 as well as 66 and 70 could trigger the burden of proof provided for by section 89(5). Counsel submitted that the alleged treatment of the individual grievors in their employment relations with the respondent could violate section 64 as well as sections 66 and 70. On the other hand, counsel for the respondent emphasized that section 89(5) made a specific reference to conduct of an employer which relates to employment or opportunity for employment or conditions of employment and that section 64 makes no explicit reference to such employment related conduct. The Board's attention was also drawn to *Craftline Industries Limited*, [1977] OLRB Rep. April 246 and *Silverwood Dairies*, [1981] OLRB Rep. Mar. 321.

5. Finally, counsel for the complainants summarized that the complaint was essentially a section 66 matter and that the allegation of a section 15 violation was somewhat secondary or collateral although important. From this perspective it was submitted that the complainants ought not to be deprived of the procedural benefit of section 89(5) simply because another section of the Act might be relevant. Counsel for the complainants emphasized that the respondent possessed all of the knowledge fundamental to explaining the conduct complained of and that it would defeat the procedural purpose of section 89(5) to require the complainants to proceed first.

6. Beginning first with section 89(5). It provides:

89.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

The section is confined to complaints alleging that persons as opposed to, for example, trade unions, have been discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the Act and such conduct must relate to such persons in respect of their employment, opportunity for employment or conditions of employment. The onus, it is to be noted, is also confined to employers and their organizations and, thus, is not relevant in the context of a fair representation complaint, for example. It is also to be observed that section 89(5) is not on its face limited to specific substantive or charging sections of the Act. More general language is employed.

7. Turning to sections 64, 66, and 70 they provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat or dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel any employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Clearly, allegations made in respect to section 66 trigger section 89(5). This section refers to employment related conduct of employers vis-a-vis employees and persons. However, it is interesting to note that section 70 makes no explicit reference to "employment, opportunity for employment or conditions of employment". Thus, while the respondent admitted that section 70, or rather allegations thereunder, trigger section 89(5), such allegations could only trigger 89(5) if it were thought that intimidation or coercion "factually" relating to a person's employment was sufficient to activate section 89(5). And, indeed, we think this was the intent of the legislature in that section 66 makes no explicit reference to the terms "intimidation and coercion", terms which are employed in sections 89(5) and 70.

8. From this analysis, one must conclude that the phrase "contrary to this Act as to his



employment, opportunity for employment or conditions of employment” does not require the reliance on a provision of the statute that explicitly deals with employment but rather s. 89(5) applies to any substantive provision that, in relation to a person, can be breached by employment related discrimination or other such improper employer conduct. Clearly, it is possible to envisage employment related discrimination which violates both section 66 and section 64 of the *Labour Relations Act* and it is our view that s. 89(5) was intended to be of benefit to persons in respect of all unfair labour practice conduct by employers affecting employment. It was not intended to give preferential treatment to any one substantive section. Accordingly, we are satisfied that the allegations made before us, if established, could constitute employer prohibited conduct with respect to persons and with respect to their employment, opportunity for employment or conditions of employment within the meaning of section 89(5). Thus, the reliance of the complainants on section 64, 66 and 70 do not justify the Board exercising its discretion and requiring the trade union to proceed first. However, even if we had concluded differently, we are not satisfied that the mere reliance on a section other than one relevant to section 89(5) should always result in the complainant proceeding first. Indeed, this case is a good example with respect to the complainants’ reliance on section 15.

9. Should the additional reliance on section 15 dictate that the union proceed first in respect to all its allegations as was the approach followed in *Craftline Industries, supra*? We think not. The section 15 allegation is integrally related to the other fundamental and primary allegations. We are not of the view that the case is one primarily relating to bargaining conduct nor can we conclude that the other sections of the Act were relied upon simply to achieve the employer proceeding first on the section 15 allegation. All the allegations involve many common factual features; we see no substantial embarrassment to the employer if it is required to proceed first; and much of the allegations involve matters primarily within the employer’s knowledge. There is no dispute that whoever proceeds first with respect to the section 15 allegation, the legal burden remains with the complainant trade unions on that issue.

10. We are therefore inclined to agree with the complainants that the primary nature of this case is one centering on sections 64, 66 and 70 and that evidence pertaining to that primary core of the complaint is likely to be relevant and integral to the alleged violation of section 15. Having regard to all of the circumstances, the employer will be required to proceed first.

11. This matter is referred to the Registrar to be listed for hearing.

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**1203-81-R** Energy and Chemical Workers Union, Local 300, Applicant, v. **Ethyl Canada, Inc.** and **F.I.R.M.**, Respondents, v. United Association of Journeymen and Apprentice of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663, Intervener.

**Related Employer – Sub-contracting relationship technically meeting criteria for related employed declaration – Board considering potential for confusion and friction if declaration made – Other labour relations reasons causing Board not to make declaration.**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members D.B. Archer and W.H. Wightman.

**APPEARANCES:** *Daniel Ublansky, C. S. Sullivan and T. Richardson for the applicant; Edward T. McDermott and W. Hoad for Ethyl Canada, Inc.; Joseph Carrier and Norman Fairbairn for F.I.R.M.; L. C. Arnold and W. Robb for the intervener.*

**DECISION OF THE BOARD;** July 22, 1982

1. This is an application under section 1(4) of the *Labour Relations Act*. That section reads as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

For ease of reference, the applicant union will be referred to as such, or simply as “the union”; the respondents will be referred to respectively as “Ethyl” and “FIRM”; and the intervener will be referred to as “the U.A.”. The applicant contends that Ethyl and FIRM are engaged in related business activities under common control or direction, and that the Board should exercise its discretion to declare the two businesses to be “one employer” for the purposes of the Act.

2. Ethyl is a manufacturer of industrial and pharmaceutical chemicals with production facilities near Sarnia, Ontario. FIRM is a mechanical contractor in the Sarnia area. The production employees of Ethyl are represented for collective bargaining purposes by the applicant. The employees of FIRM directly affected by this application are represented by the U.A.

3. The applicant was certified to represent Ethyl’s production employees in October 1979. Notice to bargain was given, and in June of 1980, the parties concluded a two year collective agreement. At the time the agreement was signed, the union was aware of the existence of FIRM and of Ethyl’s long standing use of subcontractors. The collective

agreement does not contain a restriction on subcontracting. The instant application was made on August 29, 1981.

4. There are approximately 150 hourly rated production employees in the applicant union's bargaining unit. Ethyl also employs about 100 salaried employees. The production group includes the maintenance department which employs about 48 employees. That number varies slightly from time to time. At the time of the hearings in this matter, there were approximately 52 employees in the maintenance department. Among the trades represented are the following: pipefitter, iron worker, boilermaker, millwright, hoisting engineer, vehicle mechanic, carpenter, insulator, electrician, and instrument mechanic.

5. There are currently about 9 or 10 pipefitters in the maintenance department. It is their work jurisdiction which the union claims is being eroded by the subcontracting arrangement with FIRM. While the union was somewhat unclear about the extent of its work claim, it appears to relate primarily to what the parties regard as "supplementary maintenance". The Board notes however that in adopting the parties' terminology in this regard, we do not make any qualitative assessment as to the industrial relations character or significance of the work in question. It is clear that some of the work which the parties describe as "maintenance" is really "repair" or "construction" work, as those terms are used in the construction industry portion of the Labour Relations Act. All of the work done by FIRM is done pursuant to province-wide (ICI) construction agreements.

6. Ethyl has a long history of subcontracting work to specialized trade subcontractors. Prior to 1969, almost all of its "maintenance" requirements, including both "running maintenance" and capital improvements, were provided by Catalytic Enterprises, a large firm which specializes in the supply of such services. The residual maintenance requirements were met by retaining other subcontractors. Ethyl had no maintenance employees of its own.

7. In 1969, Ethyl established its own maintenance department; however, it continued to subcontract capital improvements, modification of existing system, repairs, and "supplementary" or "overflow" maintenance jobs which, for one reason or another, could not easily be completed by its own forces. This practice was well established long before the applicant's certification, and continued thereafter. Auxiliary forces were also retained to help with the annual "turn around" when the plant was shut down for general maintenance and repair. In all of these cases, the employees of the subcontractors were working side by side, and sometimes in conjunction, with Ethyl's own employees.

8. Sometimes these contracts were let at a fixed price. Sometimes they were let on a cost plus basis. Sometimes the contracts were tendered and the subcontractor selected through a competitive bidding process; and sometimes Ethyl would simply select a contractor known to be reliable. Ethyl had both periodic and continuing relationships with a number of contractors in various trades.

9. Ethyl documents its work requirements by means of work orders which identify the work to be done and are coded so that, for accounting purposes, the work can be charged to the appropriate budget. Thus, what Ethyl considers to be capital improvements can be readily distinguished from maintenance, which is chargeable as an ongoing production cost. The maintenance budget contains a special subcomponent or fund for "supplementary maintenance" performed by outside subcontractors. This has always been the case, for as already noted, Ethyl has a longstanding practice of subcontracting such work.



10. In order to illustrate its subcontracting practices, Ethyl tendered a list of some 25 contractors who had recently been involved in supplementary maintenance or repair work on the Ethyl site. This list includes one or more contractors in the following areas of specialization: sheet metal, electrical, sandblasting, painting, structural, roofing, insulation and instrumentation. Thus, for example, sheet metal contractors were retained from time to time to repair or replace existing duct work for heating, ventilation and exhaust systems. Similarly, in order to illustrate its relationship with other mechanical subcontractors, Ethyl tendered the work orders performed by T. Moore Mechanical, one of FIRM's competitors, over the period 1978 to 1981. During that period, Moore was involved with quite a number of work orders relating to maintenance, repair, and capital jobs (in Ethyl's terms) having an aggregate value of approximately one half million dollars.

11. The company advanced a number of reasons for using outside subcontractors rather than its own forces. In each case, it was a matter of economy and efficiency. Sometimes, its own employees (or some of them) did not have the requisite skills to perform the work. Sometimes Ethyl's equipment was inadequate. Sometimes, its own forces were already fully occupied with their ongoing maintenance duties, and could not be spared for supplementary maintenance or repair — especially if the job had to be done quickly (as, for example, the removal of a potential safety hazard). Of course, the company could have tried to hire more tradesmen on a part-time or full-time basis, but William Hoad, the plant manager, told the Board about the company's frequent unsuccessful efforts in this regard. Experienced tradesmen were difficult to find. In any event, the company was unwilling to permanently expand its maintenance department, preferring instead to meet its fluctuating needs by employing its own forces on overtime and, where necessary, engaging outside contractors to fill in the gaps. FIRM is one of these contractors.

12. Ethyl asserts that its relationship with FIRM is not much different from that of the various other subcontractors with which it deals from time to time, and that there is no basis for a section 1(4) declaration. The union argues that this particular subcontracting relationship does meet the requirements of section 1(4) and that a declaration is necessary in order to prevent an erosion of the union's bargaining rights and work jurisdiction. In order to fully appreciate the union's claim, it is necessary to examine the evolution of Ethyl's dealings with FIRM, as well as the special relationship which T.N. Fairbairn has with the two companies. Mr. Fairbairn is both Ethyl's maintenance superintendent and the principal owner of FIRM.

13. From 1956 to 1969, Fairbairn was employed by Catalytic and worked as a maintenance supervisor on the Ethyl site. During this period, it will be recalled, Catalytic fulfilled virtually all of Ethyl's maintenance requirements. When Ethyl set up its own maintenance department in 1969, it hired Fairbairn as its job superintendent. Fairbairn worked in this capacity until 1976 when he left Ethyl's employ to work for Shell and Polysar. Bill Smith, FIRM's current site supervisor and a part-owner, also worked for Catalytic until 1969, and for Ethyl until 1978 when he too sought employment elsewhere with another mechanical subcontractor.

14. In late 1979, Ethyl became increasingly concerned about the performance of its maintenance department. There was a back log of some 1300 incomplete work orders and in Hoad's view, costs in that area were out of control. The department simply had to improve its efficiency in order to minimize the resort to expensive outside contractors hired on a cost plus

basis. Moreover, the seeming inability of the maintenance department to keep up with its ongoing responsibilities resulted in costly down time for Ethyl's production equipment. Hoad decided that part of the problem was a lack of effective managerial control and after some discussion, it was decided to bring Fairbairn back as a "consultant" to run that department as he had before. On January 23, 1980, Ethyl and Fairbairn entered into a renewable six month agreement to this effect.

15. The designation "consultant" is a little misleading. Essentially, Fairbairn became an employee of Ethyl occupying the position of maintenance supervisor. He was paid on an hourly basis and expected to put in a regular day's work for Ethyl. Fairbairn was fully responsible for the day-to-day maintenance of all units at the Sarnia plant including preventive maintenance, the preparation of spare parts, and cost control in the maintenance department, as well as the supervision and assessment of the Ethyl employees who reported to him. Fairbairn was performing the same job functions as the previous maintenance supervisor. He had the same job description, and his authority approximated that of other department heads in the Ethyl operation with whom he had to co-ordinate his activities. Fairbairn was responsible for imposing any employee discipline which might be required, and he represents management in the grievance procedure. The original consulting contract was periodically extended with appropriate revision in compensation but no other significant change in Fairbairn's duties and responsibilities.

16. FIRM was incorporated on January 25, 1980, shortly after Fairbairn had taken over Ethyl's maintenance department. Fairbairn is a 70% owner of FIRM. His brother owns 20% and Bill Smith owns 10%. FIRM is a member of the Mechanical Contractors Association of Ontario, has a bargaining relationship with the U.A., and is a party to the Provincial Pipe Trades collective agreement. Pursuant to that agreement, FIRM meets its employee needs through the U.A. Hiring Hall, and pays the negotiated wage rates. There is no interchange of employees between Ethyl and FIRM.

17. FIRM operates from a small office in Sarnia in a building in which Fairbairn's brother operates a moving business. FIRM pays no rent for this space, nor is there any evidence that anyone receives a salary from FIRM other than Bill Smith, and of course, the hourly rated tradesmen who are employed and paid in accordance with the U.A. collective agreement. Fairbairn draws no salary from FIRM nor does FIRM receive the benefits of the consulting fees paid to him by Ethyl. Such clerical work as FIRM requires is done by employees of the moving company, and Smith assumed that they were paid by the moving company as well. Smith was unaware of any clerical salaries paid by FIRM.

18. Smith runs the day-to-day operations of FIRM doing both the onside supervision and preparation of the bids. Smith determines the number of employees to be hired and the mix of trades. Smith handles all labour relations and payroll issues. Fairbairn has no direct involvement in any of these activities. The three principals meet every week or so to discuss the company's situation, but its ongoing activities are left entirely to Smith.

19. Save for one recent job for Liquid Carbonic (which was also at the Ethyl site), *all* of FIRM's business has come from Ethyl. FIRM has solicited work elsewhere but to date has been unsuccessful. G.R. Mills, Hoad's superior, described FIRM as a "labour broker" giving Ethyl access to A.F. of L. tradesmen which would not otherwise be possible without a direct relationship with their respective unions. This is not an inaccurate description of FIRM's

position — although it might be noted that the same could probably be said for some of Ethyl's other subcontractors. The difference, of course, and the fact upon which the applicant relies, is that Fairbairn is both the manager of Ethyl's maintenance department, and the principal owner of one of its maintenance subcontractors. In this respect, FIRM's position is somewhat different from that of its competitors.

20. Apart from the role of Fairbairn, and the series of subcontracts between Ethyl and FIRM, there are no business or other relationships between the two companies, and none of the usual indicia of control. There is no common share ownership. There are no common directors. Ethyl has no financial interest in FIRM whatsoever. It has neither lent money to FIRM nor guaranteed FIRM's debts. It receives no particular benefit if FIRM prospers, and suffers no particular prejudice if FIRM does not. If FIRM were to go out of business, Ethyl would simply employ another subcontractor as it has done before, and continues to do when FIRM's bid are too high, or for some other reason Ethyl decides to use another mechanical subcontractor. Ethyl has no control over FIRM's employees or their terms and conditions of employment. The businesses do not share banking, accounting, or legal services, or office space. Ethyl provides FIRM with certain facilities on site, but we are satisfied on the evidence that these do not differ significantly from what it provides for other subcontractors retained from time to time. There is no interchange of employees, common signs or logos, letterhead, or office staff. As already noted, Ethyl is in the business of manufacturing chemicals. FIRM is a mechanical contractor. Ethyl does not even guarantee FIRM any particular volume of work. Jobs are let periodically as Ethyl's needs require, and the evidence indicates that, on balance, Ethyl would usually prefer to have that work done by its own forces. As Hoad put it, Ethyl is not in the business of keeping FIRM in business.

21. Ethyl's relationship with FIRM began with a service contract wherein Bill Smith was retained as a consultant to do an inventory of existing spares, and assess servicing needs and priorities. This job consumed about six weeks. It was directed to FIRM because none of Ethyl's own employees could be spared to do it, and because Smith had considerable specialized knowledge of Ethyl's operation. At the time, all of Ethyl's own employees were fully engaged doing running maintenance.

22. After this initial contract, FIRM did a number of different jobs for Ethyl of both a capital and non-capital nature — some of a fixed price, some of a cost plus basis, some with bids, and some without bids. But FIRM did not fulfill all of Ethyl's mechanical subcontracting needs, and where there were jobs put out to tender, FIRM did not necessarily win. For example, the opportunity to work on the installation of a new "scrubber system" (an environmental protection system) was lost to its competitor T. Moore Mechanical.

23. The Board had before it a great deal of evidence about each of the projects in which FIRM was involved, from its incorporation to the filing of the instant application. Those projects were documented by a number of purchase orders upon which Mr. Hoad was closely cross-examined. We see little point in reproducing the details of that evidence here. It will suffice to outline its general character.

24. As already noted, FIRM worked on both capital and non-capital jobs — although again, it should be noted that these terms are little misleading since they are employed for Ethyl's accounting purposes, and do not necessarily correspond to the actual character of the work. Nor do they properly describe the division of labour between maintenance and non-



maintenance, functions. Some of what Ethyl describes as “maintenance”, and much of what it describes as supplementary or overflow maintenance, involves the fabrication of the piping systems and is really repair or construction work. In addition, its own maintenance forces have clearly worked on construction or capital projects when their time permitted. Ethyl maintenance forces have done such things as concrete forming work, and the wiring in a new building being erected on the site. It is difficult to characterize this as maintenance work.

25. For the most part, FIRM was retained on a job by job basis to perform a particular project. In one instance, it obtained a “blanket purchase order” covering a number of jobs, but it appears that this was an effort by Ethyl to secure a kind of “volume discount”. Sometimes FIRM was chosen simply because of its previous involvement and familiarity with an earlier job. On the so-called “D.R. — I Debottling Project” FIRM had been involved in the first phase, so when a problem arose which had to be handled quickly FIRM was retained. FIRM was already on the site at the time for another purpose. The relationship between FIRM and Ethyl is one of mutual convenience.

26. FIRM can work as both a mechanical and general contractor. In July of 1980, when the company added a new centrifuge to its pharmaceutical unit, FIRM did the piping work and arranged the subcontractors of the other trades (including masonry, excavation, heating and ventilation). Whether or not it is acting as a general contractor, FIRM typically works in conjunction with other subcontractors, and also in either close proximity to, or in conjunction with, Ethyl’s own employees. In April of 1981, for example, FIRM was engaged to repair organic lead leaks. It did some of the installation work, while Ethyl’s own forces did certain other aspects of the job. Often the work which FIRM did was of the kind which historically has been subcontracted; and in the gray area of “shared jurisdiction”, FIRM was only used when Ethyl’s own complement could not handle the job. Typically, the few non-capital jobs given to FIRM involved work orders originally assigned to Ethyl’s own maintenance department which, after weeks or months, still had not been completed. In the case of the annual turn arounds, Ethyl simply could not hire enough skilled employees for this short period of time, whereas, through FIRM, it had access to the U.S. Hiring Hall, and could easily augment its forces. On the turn around, Ethyl and FIRM employees worked side by side. In 1979, (long before FIRM’s incorporation), Ethyl had employed another mechanical subcontractor to help with the annual turn around.

27. Ethyl provides FIRM with small hand tools, space in a warehouse on the site, and access to its shop tools if Ethyl employees are not using them. The same use and access is given to other subcontractors. FIRM employees also use the Ethyl punch-clock, as do other subcontractors, and as did Catalytic. FIRM has its own trailer/office, lunch room, pick-up truck, welding machines, sanders, pipestands, drill, and fabrication benches.

28. The hourly wage rates paid to FIRM employees are considerably higher than those paid to Ethyl’s own employees, so prima facie, it might be argued that it is more expensive to use FIRM rather than to employ its own forces. However, usually, Ethyl’s own employees are already fully occupied so that more intensive use of its own employee complement would involve overtime. Moreover, the diversion of its employees from their usual duties could result in more production down time. Consequently the actual economics of the situation are difficult to assess. Hoad thought, on balance, that it was more efficient to use a subcontractor to meet periodic work overloads, although he preferred fixed price contracts let on competitive tender. Unfortunately, this was not always possible because Ethyl’s engineering

department has been chronically understaffed and unable to prepare tender documents for all of the work required. And since FIRM was already on site, it was frequently convenient to either shop around informally to ensure that a proposed price charged by FIRM was competitive, or simply to give FIRM the contract on a cost plus basis. It was a process of “shopping around” which preceded the issuance of the blanket purchase order mentioned above. The evidence does not demonstrate that Ethyl is consciously attempting to undermine the bargaining unit by diverting work to FIRM. On the contrary, the evidence suggests that Ethyl would generally prefer not to do so.

29. Neither Hoad nor other members of Ethyl management were entirely satisfied with the relationship with FIRM. They were sensitive to the charge of favoritism or conflict of interest because of Fairbairn’s dual role. They were also aware of their own employees’ concerns. But because of the problems in the engineering department, introducing more competition through competitive bidding, was not readily feasible. And there was no doubt that Fairbairn was doing a good job running the maintenance department. A backlog of some 1300 purchase orders in existence when he was hired had been reduced to almost 250.

30. Hoad was concerned that if FIRM was engaged simultaneously on a fixed price and cost plus job there could be leakage from one to the other; and he was also concerned lest Fairbairn misrepresent the capacity of the maintenance department and thereby divert work to FIRM. However, to meet this potential problem Hoad and Mills, his superior, resolved that in addition to the usual checks by the purchasing and engineering departments, Hoad himself would make a special effort to scrutinize all work given to FIRM — especially work of a non-capital nature which could conceivably be done by Ethyl’s own forces. This would ensure that proper priorities and cost controls were being maintained, and that sub-contracting decisions were ultimately made by persons other than Fairbairn. In addition, it was decided to press the engineering department to increase its effort to prepare suitable documentation so that bids for mechanical contracting jobs could be tendered.

31. These concerns were expressed in an exchange of confidential memos between Hoad and Mills in the Fall of 1980 (i.e. long before the commencement of the present proceedings). After detailing the problems which the relationship with FIRM created, Hoad went on to say:

“Recently, however, Fairbairn’s use of his position as Maintenance superintendent became excessive. He gave me a pile of 6 or 8 work orders with drawings for pipe fabrication and installation, and requested that this work be assigned to F.I.R.M. on a “cost-plus” basis. I refused to do this because (a) Fairbairn would be diverting work into his own company on a “cost-plus” basis, and (b) he would be operating a fixed price contract and a cost-plus job on the plant simultaneously and, from an auditor’s viewpoint anyway, I would be hard-pressed to guarantee that some of the fixed price work and costs didn’t slip into the cost-plus work and costs. This does not imply that it would happen, but it could. In the fixed price contract, the labour and tools, welding machine, truck and trailer etc., rentals are all included. In the cost-plus situation, they can all be viewed as extra costs.

There were several other ways to get the work done —

- (1) F.I.R.M. on fixed price

- (2) another contractor on fixed-price or cost-plus
- (3) Ethyl maintenance on straight time or overtime

Of these I chose the latter, primarily because of the time constraint in preparing for the ETCL-EDC turnaround. It is not the least expensive route. However, in addition to the primary reason it will show our own employees that they have job security and their work is not being given away. It should also demonstrate that neither Ethyl or any of its management has any interest in F.I.R.M. receiving contracts.

The above decision was not well received by Fairbairn. As I understood what he said, he claimed that he had been promised this type of work. The F.I.R.M. situation is very vulnerable to criticism, justified or not. Critics could be other contractors in the area. Several people in Ethyl are concerned about the ethics of the situation and if conflict of interest exists.

The eighties may be the decade of protecting your donkey. Until someone can describe what is ethical and what is not, and where conflict of interest starts and ends, I plan to protect mine and Ethyl's. There is nothing but trouble in compromising decisions in favour of a supplier."

It is evident that FIRM is not the alter ego of Ethyl, nor was Ethyl insensitive to its employees' concerns. Despite the obvious utility of the relationship with FIRM, Ethyl management was determined to maintain an arm's-length, business-like arrangement.

32. Following this exchange of memos, the additional controls were put in place. Hoad personally examined the flow of work to FIRM. Despite his suspicions, he was satisfied that each job let to FIRM did indeed have to be handled by an outside contractor, and that using FIRM was the most efficient way of having the work done.

33. Ethyl generates approximately 8000 work orders per year. Throughout the hearing of this matter, the applicant was pressed to specify precisely what work was being improperly diverted to FIRM, and precisely how its work jurisdiction was being eroded. Its answer was not entirely clear but, as noted above, focused on supplementary maintenance or repair work which in the view of Ethyl management, its own employees had difficulty getting around to. Ironically, over the period of FIRM's existence, and despite the professed concern about its presence, employees have periodically complained about too much as well as too little overtime. No Ethyl employee gave any direct evidence of work which, in his opinion, he should have done but which was done by employees of FIRM. Moreover, there is apparently no complaint about subcontracting per se — only subcontracting to FIRM. In the circumstances, the respondents submit that the employee concerns are related as much to their antipathy to their boss, as to the loss of potential work. In any event, since the company began using FIRM, there has been no decrease in the employee complement in the maintenance department; and all of the evidence suggests that if FIRM were not available, another subcontractor would be used (and, indeed, was used from time to time). Success in the instant application therefore would not necessarily enhance the job opportunities for Ethyl employees. It would only mean that supplementary maintenance was done by another subcontractor. And, for reasons which we will explore below a section 1(4) declaration might



well result in a net loss of work which the employees have traditionally done. After sifting through all of the evidence, heard over several days of hearing, it appears to the Board that the union's concern is related solely to about a dozen non-capital work orders performed by FIRM over the 18 month period from February 1980 to August 1981. This number must be considered in light of the thousands of work orders performed in the same period by Ethyl's own employees or the employees of other subcontractors.

34. The evidence also indicates that the union and its members were well aware of FIRM's existence. C.S. Sullivan, a representative of the Union, testified that he learned about FIRM in the winter of 1980 while engaged in negotiations for the parties' first collective agreement. FIRM's employees were frequently on the site, and worked side by side with Ethyl employees on the turn-around in the summer of 1980. Sullivan raised the role of FIRM in discussions with Ethyl management in January 1981, and at that time, suggested that the union would file a section 1(4) application. Yet that application was not filed, in fact, until 8 months later. If the union were seriously concerned about the erosion of its work jurisdiction, it certainly did not move very quickly to protect its exposed position — perhaps because the bulk of FIRM's work really was of the kind that the company usually subcontracted, and really was beyond the capacity of Ethyl's existing complement. Meanwhile, of course, FIRM developed an established commercial relationship with Ethyl, and various collective bargaining relationships with the U.A. and other trade unions whose members it employed. The applicant union, by this application, seeks to set aside those established relationships.

35. The union argues that FIRM is a mere instrumentality of Ethyl which provides its sole source of work. The capital structure of FIRM is minimal, and in the union's submission it depends largely on the use of inside information and equipment owned or traceable to Ethyl. The union argues that FIRM's separate legal identity is entirely artificial. In substance, FIRM is merely Ethyl's supplementary maintenance department which, by its existence, permits the diversion of work opportunities outside the bargaining unit. The union acknowledges Ethyl's right to subcontract work but, it argues, it must be a bona fide subcontract to a truly independent business. It cannot subcontract to itself or what, in the union's view, amounts to the same thing, to a company owned by a member of Ethyl's management working solely for Ethyl's benefit. Finally, the union maintains that it did not condone this arrangement. When it became aware of the potential erosion of its bargaining rights, it brought the matter to Ethyl's attention, sought to reach an accommodation through negotiations, and as early as January 1981, put the company on notice that it would seek relief under section 1(4) if necessary.

36. The respondents argue that the relationship with FIRM does not alter the status quo nor does it undermine the applicant's bargaining rights. The relationship with Ethyl is no different from that with other subcontractors and the company has a long and well established practice of subcontracting precisely the kind of work that FIRM has been doing. The union's claim is limited to only about a dozen work orders over a two year period, yet during this time, there has been no reduction in the employee complement in the maintenance department. At one time *all* maintenance was done by subcontractors, and the evidence indicates that if FIRM did not do the work in question, another mechanical subcontractor (such as T. Moore Mechanical) would. The evidence further indicates that in each instance work went to FIRM because it had not been, or could not be done by Ethyl's own employees. Not a single union witness was called to refute this proposition. Despite Hoad's suspicions, even he was convinced of the need to subcontract work to FIRM; moreover, in the respondents' submission the controls put in place by Hoad establish both an arm's length relationship with

Ethyl, and Ethyl's real concern to maintain it. In Ethyl's submission, it is merely a purchaser of specialized services from a small contractor. It is not a common employer. None of the usual indicia of common control are present in this case nor is there even any guarantee of work. The respondents also point to the potential anomaly which might result. Would Ethyl be plugged in to the U.A. collective agreement and become part of the province-wide bargaining agency? Would FIRM have to use Ethyl maintenance employees on construction work, or would both companies have access to the U.A. Hiring Hall? How would such questions be resolved? What conditions would prevail: the terms in the production agreement or the more generous provisions in the construction agreement? And, since the applicant does not claim all of the work done by FIRM, how would that work be divided? A section 1(4) declaration could merely exacerbate what is essentially a jurisdictional dispute and raise a host of new industrial relations issues. Finally, having delayed seeking a 1(4) application for more than a year, the respondents argue that it is now too late.

## II

37. Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect Section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.

38. The Board accepts the applicant's submission that section 1(4) may impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own. There is something to the notion that a company cannot subcontract to itself, or what may be the same thing, to an entity totally controlled by it.

This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer's premises, with the first employer's equipment, in conjunction with the work performed by the first employer's own employees, and subject to the first employer's overall direction and control. The *A & P* decision provides a case in point (see *The Great Atlantic & Pacific Company of Canada Limited* [1981] OLRB Rep. March 285). In *A & P*, regulatory legislation prevented the well known food chain from entering directly into the pharmacy business, and prompted it to create a new corporate vehicle to run the pharmacy department which it had established in some of its larger stores. That corporate vehicle was nominally run by an independent pharmacist; but in reality, was wholly controlled by A & P. There was no anti-union motivation, but the separate legal identity of the "drug company" was totally artificial from a collective bargaining point of view, and in the result,

the Board issued a related employer declaration. The drug company had no independent existence and no business activities apart from A & P. The fact that it hired its own employees, paid them, and directed them in their daily activities did not obscure the reality of the situation.

39. The application of section 1(4) to a relationship described as “merely subcontracting” was also discussed in *The Charming Hostess Inc.* [1982] OLRB Rep. April 536. In that case, Molson’s had subcontracted food and hospitality services formerly provided by its own employees to two subcontractors specializing in this business. As in the instant case, the subcontracting arrangement was entered into because of Molson’s conclusion that the specialized subcontractors could do a better job than its own employees; and also, as in the instant case, the employees of the subcontractor worked on Molson’s premises with some of Molson’s equipment to provide services to Molson’s detailed specification. There too, the Board observed that there may be limits on the extent to which an employer could substitute the employees of another employer for its own while retaining close control over their activities:

“43. The union argues that the language of section 1(4) is broad enough to cover a variety of subcontracting arrangements — especially those which do not involve “contracting out”, but which might more appropriately be described as “contracting in”, or “labour only” subcontracting. Where A enters into a relationship with B whereby B comes into A’s premises to perform functions to A’s specifications formerly undertaken by A’s own employees, there will inevitably be what the Board in *Metropolitan Parking Inc.*, *supra*, described as a “symbiotic relationship” between the two business entities. The activities carried on by the two firms will be complementary. They will obviously and necessarily be “related”, and efficiency will usually require that there be some degree of coordination, common control, or direction. That is the applicant’s characterization of the situation in the instant case.

44. The Board accepts that there may be subcontracting relationships which can be characterized as a form of joint venture and could fall within the ambit of section 1(4). The Board adverted to that possibility in *Ontario 474619 Ltd.*, *supra*. The more closely the purchaser of employee services controls when, where, how, by whom and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. If at the same time the subcontractor is effectively dominated by the purchaser and it appears that the notion of a subcontract is introduced not to provide independent managerial and employee skills but rather a separate “non-union” corporate vehicle which permits the purchaser to have the same work performed in much the same way as before but beyond the ambit of its collective agreement, a section 1(4) declaration might well be warranted. It was considerations such as these which appear to have prompted the Board to issue 1(4) declarations in *Donald A. Foley Limited* [1980] OLRB Rep. Apr. 436, and *J.H. Normick Inc.* [1979] OLRB Rep. Dec. 1176, even though there was no direct financial ownership of the subcontractor in either case.”



Ultimately however, the Board concluded that the subcontractors were independent businesses operated for the benefit of their own principals, and could not be considered a mere shell or the alter ego of Molson's. The Board also noted that the union had never had an unequivocal claim to the body of work now done by the subcontractors and in consequence, the Board was reluctant to permit section 1(4) to be used as a springboard for the extension of bargaining rights or work jurisdiction.

40. The situation in the instant case bears some similarities with both *A & P* and *Molson's*, however we are satisfied that it more closely resembles the latter case. While we accept that there may be some cases characterized as "subcontracting" which would be susceptible to the application of 1(4), we are not satisfied that this is one of them, or that even if the situation meets the linguistic parameters of section 1(4), the Board should exercise its discretion to make a section 1(4) declaration. In reaching this conclusion, we have taken a number of factors into account.

41. We note first the respondent's well established practice of subcontracting the very kind of work which the union, through the vehicle of this proceeding, is now claiming. That practice of subcontracting continued both before and after the applicant's certification and there is nothing in the parties' collective agreement to prevent it. Given this established past practice, the applicant's members do not have an unequivocal claim to the work in question nor are we satisfied on the evidence that there has been any significant erosion of their work jurisdiction. The applicant's claim relates at most, to about a dozen of the thousands of work orders issued by Ethyl and eventually completed by its own employees as by other contractors in accordance with Ethyl's longstanding practice. Moreover, such functions are peripheral to Ethyl's main activity and are of the kind which, in the industry, are typically subcontracted — often to established businesses like Catalytic. The applicant would have a stronger case if Ethyl purported to "subcontract" its core functions or, as in *A & P*, had the work of one of its departments done by a totally dominated corporate entity. It was situations like these which prompted the Board to pierce the corporate veil, in the *Foley* and *Normick* cases (cited *supra*).

42. The evidence indicates that if the work were not done by FIRM or if FIRM ceased to exist as a going concern, it would be done by one of FIRM's several competitors. In fact, it is by no means clear that the issuance of a section 1(4) declaration, would, in itself, create any redistribution of work or foreclose Ethyl from continuing very much as before. What it would clearly do, is create a legal anomaly since, two separate legal entities bound by two separate collective agreements would become a single entity for labour relations purposes. The legal uncertainties that that would create, and the potential for friction, jurisdictional disputes, and further litigation, are all obvious — especially since the line between construction and maintenance work is a hazy one, and some of the work which is done by Ethyl's own employees is clearly in the construction category and would arguably be subject to the province-wide bargaining scheme prevailing in the ICI sector of the construction industry. We are not aware of any case in which the Board has made a section 1(4) declaration in respect of a related employer with a well established collective bargaining relationship, and there are a good labour relations reasons why we should not do so.

43. We also note that this case is novel in a number of respects. There are none of the traditional indicia of common control or direction (interlocking directorships, common shareholders, shared facilities, etc.). What the union relies upon is the economic dependence of FIRM, and the role of Fairbairn.

44. There are 2 or 3 cases which ground a section 1(4) declaration on familial or economic relationships which permit one firm to exercise *actual* direction and control over another even in the absence of legal control or a formalized partnership or joint venture; however, these cases are a minority and none of them are similar to the present case. Here, not only are there different collective bargaining relationships, different terms and conditions of employment, and no intermingling of employees, but in addition, Ethyl has taken special steps to maintain an arm's length relationship. We are satisfied that these steps were taken bona fide, in an effort to ensure that work was not subcontracted unless it was absolutely necessary. Not only is Ethyl not intentionally using FIRM to avoid its existing bargaining obligations, it is resorting to FIRM with some reluctance, and only in circumstances where it cannot be avoided. These circumstances, when viewed as a whole, are quite remote from the problem to which section 1(4) is usually addressed, and as we have already noted, the evidence of concrete "mischief" is less than compelling.

45. Finally, the Board notes that even though the applicant was aware of FIRM's existence for more than a year, it did not file the instant application until August of 1981. Meanwhile, FIRM developed settled commercial and collective bargaining relationships. Even if we were satisfied that Ethyl's relationship with FIRM falls within the parameters and mischief of section 1(4) (and we reiterate that we are not convinced that it represents any significant alteration of the status quo) delay is a factor to be considered — especially when a direction under section 1(4) might be difficult to implement or precipitate further litigation.

46. Having regard to the totality of the evidence in this case, the Board is not persuaded that a section 1(4) declaration is warranted. The application is therefore dismissed.

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**2685-81-M; 2686-81-M; 2687-81-M Famous Players Limited,** Employer, v. Motion Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Trade Union; Canadian Odeon Theatres Ltd., Employer, v. Motion Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Trade Union; Premier Operating Corporation Limited, Employer, v. Motion Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Trade Union.

**Conciliation – Reference – Successor Status – Trade Union Status – Whether organization of trade union locals meeting definition of “Trade Union” or “Council of Trade Unions” – Only trade union can be successor to another trade union – Status of uncertified council of trade unions in collective bargaining – Trade union properly named in request for conciliation.**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

**APPEARANCES:** *B. R. Baldwin, John Williamson and Harry Green for Famous Players Limited; B. R. Baldwin, John Williamson and Bob Yeoman for Canadian Odeon Theatres; B. R. Baldwin, John Williamson and John Stewart for Premier Operating Corporation; Stephen Shanfield, John Pistor, Lee Carpenter, Hugh Usher and Larry Steih for the trade union.*

#### **DECISION OF THE BOARD; July 16, 1982**

1. These are three references from the Minister relating to his authority to appoint a conciliation officer. In each case, the key portion of the reference to the Board from the Minister reads as follows:

“(1) By application dated February 26, 1982, the employer requested the Minister of Labour to appoint a conciliation officer in the above matter pursuant to section 16 of the Act.

(2) By telecommunication of March 3, 1982, counsel for the trade union and the Ontario Projectionists Association objected to the employer’s request for conciliation, asserting that the trade union has designated the Ontario Projectionists Association as its agent for the purpose of collective bargaining with the employer.

(3) In a letter of March 3, 1982, counsel on behalf of the employer responded to the objection, submitting that the trade union is the proper party to its application for conciliation.

(4) A question has arisen that in the opinion of the Minister relates to his authority to appoint a conciliation officer in the circumstances of this request.



(5) Specifically, the question is whether it is the trade union or the Ontario Projectionists Association which has the authority to bargain for the unit of employees that is the subject of the request for conciliation.”

2. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (“the Alliance”) is an international union headquartered in the City of New York in the United States of America. The Alliance is active in various aspects of the entertainment industry. In these proceedings, however, we are concerned only with members of the Alliance employed as projectionists.

3. The affairs of this Alliance are governed by its international constitution. Article 1 section 3 of the international constitution deals as follows with the issue of union membership:

“The membership of this Alliance shall comprise the members in good standing of such local unions as shall hold a charter from this Alliance, and said affiliated local unions and such persons who, having been members of any local union which has had its charter revoked or suspended, shall retain their membership in this Alliance in the manner provided in these laws, and such persons as may acquire and hold direct membership in this Alliance pursuant to these laws.”

4. Local 432 is a chartered local of the Alliance headquartered in the City of Peterborough. The affairs of the Local are governed by both a local constitution and local by-laws, as well as by the international constitution of the alliance. It is of some importance to note that the charter of Local 432 has never been revoked or suspended.

5. In the past Local 432 has entered into separate collective agreements with three major movie house chains, namely, Canadian Odeon Theatres Ltd., Famous Players Limited and Premier Operating Corporation Limited (“the companies”). The negotiations with the three companies were carried on at the same time (apparently through joint negotiations) and resulted in three almost identically worded collective agreements limited to the Peterborough area. The most recent collective agreement between the companies and Local 432 expired on December 31, 1981.

6. Just as Local 432 has bargained with the three companies for the Peterborough area, so its sister locals across the province have bargained with the companies with respect to their respective geographic jurisdictions. Over time the officers of most of the locals came to the conclusion that their membership would be better off if the locals could bargain jointly with the three companies. To this end twelve Ontario locals of the Alliance, including Local 432, established the Ontario Projectionists’ Association. The various steps required to establish the association were completed on February 25, 1981 when the International President of the Alliance formally endorsed the association’s constitution. It is clear from a reading of this constitution that membership in the association is limited to union locals, and that individual projectionists cannot be direct members. Particular reference is made to the following articles in the association’s constitution:

“1.1 *Name & Object*

The name of this organization shall be The Ontario Projectionists’

Association of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada.

This association is dedicated to the principles of trade unionism. Its objects are to unite the Projectionist Locals of the I.A.T.S.E. in Ontario for the purpose of joint negotiations and to engage in such other activities as may be in the best interest of the constituent locals of the O.P.A.

## 1.2 *QUALIFICATION FOR MEMBERSHIP*

The membership of this association shall consist of all I.A. locals in Ontario who represent projectionists. Each application for membership shall be accompanied with a letter of commitment and \$100.00 application fee.

## 2.2 *BASIS OF REPRESENTATION*

Each affiliated local shall have one vote and one designated representative in the O.P.A. Each local union shall be entitled to one additional guest visitor who shall have no official status or vote.

## 2.3 *REVENUES*

All expenses of the O.P.A. shall be equally divided between its affiliated local unions."

Reference is also made to paragraph 3 the by-laws of the Ontario Projectionists' Association which provides that local unions can withdraw from membership in the association.

7. On October 6, 1981, the president of Local 432 wrote to each of the three companies as follows:

"This is the official notification that Local 432 desire to open for negotiations the agreement with your company that expires on December 31, 1981.

Local 432 as a member of the properly constituted "Ontario Projectionists Association" has designated the power to this Association to negotiate our contracts.

The O.P.A. Committee will be pleased to meet with you as soon as possible to begin negotiations."

8. On November 24, 1981, Mr. Lawrence Steih, the secretary-treasurer of the Ontario Projectionists' Association wrote to the three companies as follows:

"Please be advised that the Ontario Projectionists' Association of the International Alliance of Theatrical Stage Employees and Moving

Picture Machine Operators of the United States and Canada has been appointed by the following I.A. Locals in Ontario to act as their representative in the upcoming contract negotiations with your company.

Local 105 — London, Ontario  
 Local 257 — Ottawa, Ontario  
 Local 303 — Hamilton, Ontario  
 Local 345 — Brockville, Ontario  
 Local 357 — Kitchener, Ontario  
 Local 432 — Peterborough, Ontario  
 Local 461 — St. Catharines, Ontario  
 Local 467 — Thunder Bay, Ontario  
 Local 528 — Kingston, Ontario  
 Local 580 — Windsor, Ontario  
 Local 582 — Brantford, Ontario  
 Local 634 — Sudbury, Ontario

These Local Unions of the I.A.T.S.E. possess the bargaining rights for their respective members and have seen fit to appoint a negotiating committee consisting of the Ontario Projectionists' Association of the I.A.T.S.E., which is properly constituted, and has been endorsed by the International Alliance's General Office.

The Power of Attorney has been inferred to the Ontario Projectionists' Association by these Locals and, with respect to that power, hereby request a meeting at a mutually agreed upon date, such meeting to take place in the City of Toronto, Ontario to discuss the terms and conditions of the agreements which affect these Locals.

If your company is not in agreement, then Affiliates of the Ontario Projectionists' Association have no choice but to file for a conciliation officer."

9. The three companies responded to the letters from both Local 432 and the Ontario Projectionists' Association in a similar vein. Typical was the following letter dated December 10, 1981 from Famous Players Limited to Local 432:

"In response to your letter of the 27th day of November, 1981, this is to advise that this Company will not agree to negotiations taking place jointly with other I.A.T.S.E. Locals in Ontario, as you have suggested. It is this Company's position that it will negotiate with the Local in Peterborough, Ontario, with whatever bargaining committee has been appointed by the Local. The Company is not prepared to negotiate at one central bargaining meeting for all Locals. This has not been the practice of the Company in the past as it is the Local that clearly possesses the bargaining rights for the employees affected by these negotiations.

We also advise that we consider the position that the Local is taking with



other Locals in order to achieve any meetings between the parties to be a refusal to bargain in good faith and make every reasonable effort to make a Collective Agreement.

We suggest that a meeting be held on the 18th day of January, 1982, in Peterborough, Ontario, in order to commence negotiations. Please confirm if this date is acceptable.”

10. On February 26, 1982 each of the three companies requested the Minister of Labour to appoint a conciliation officer to assist the parties to effect a collective agreement. In each case the request named Local 432 as the trade union. By telegram to the Minister, dated March 3, 1982 counsel for the Ontario Projectionists Association objected to the appointment of a conciliation officer on the grounds that the Association was the proper party to the negotiations in that it had acquired “the rights, privileges and duties of its predecessor Local 432 by reason of a merger, amalgamation or transfer of jurisdiction”. This objection prompted the Minister to refer the matter to the Board.

11. At the hearing before the Board, counsel for the Ontario Projectionists’ Association contended that pursuant to section 62(1) of the Act, the Board should declare that the Association had acquired the rights, privileges and duties of Local 432, including the right to negotiate collective agreements. Section 62(1) of the Act provides as follows:

“Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.”

12. For section 62(1) to be applicable, it is clear that the rights, duties and privileges of one trade union must have been transferred to another trade union. The companies contend that the Ontario Projectionists’ Association is not a trade union whereas the association submits that it is. It is now well established that at common law a trade union is an organization of employees who have bound themselves together in a contractual membership one with another. This point was perhaps most clearly put by Mr. Justice Evans when delivering the majority decision of the Ontario Court of Appeal in *Astgen v Smith* (1977) 7 D.L.R. (3d) 657. In referring to the International Union of Mine, Mill and Smelter Workers his Lordship stated (at page 662):

“Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelled out in

the memorandum of association usually referred to as the 'constitution'; the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill."

See also the decision of the Supreme Court of Canada in *Orchard v Tunny* (1957) 8 D.L.R. (2d) 273 at pp. 281-282.

13. An employee usually joins a chartered local of a trade union, and thereby enters into a contractual relationship with other members of the local. The terms of this contractual relationship are usually to be found in both the constitution of the "parent" trade union which chartered the local as well as in the constitution and by-laws of the local itself. In joining a union local, an employee also becomes a member of the parent union. In so doing he enters into a contractual relationship with all other members of the union (even those in other locals), the terms of which are to be found in the parent union's constitution. Having carefully reviewed the constitution and by-laws of Local 432 as well as the constitution and by-laws of the Alliance, we are satisfied that both the local and the Alliance are trade unions at common law.

14. The Ontario Projectionists' Association is not in our view a trade union at Common Law. It is not an association of individuals who have contractual links one with another. Rather it is an organization of trade union locals. Counsel for the Ontario Projectionists' Association referred us to a 1953 decision of the Saskatchewan Court of Queen's Bench in *Re F. W. Woolworth Company Limited and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, C.I.O.* 53 CLLC ¶15,071 in which it is held that an association of trade unions is itself a trade union. With respect, however, we are unable to concur with this result. In that an employee has no individual rights vis-a-vis an association of trade unions, we are satisfied that such an association cannot be a trade union at common law.

15. Section 1(1)(p) of the *Labour Relations Act* sets out the following definition of a trade union for the purposes of the Act.

"'trade union' means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency."

The first part of the statutory definition wherein it refers to a trade union as being an "organization of employees" would take in all organizations which would qualify as trade unions at common law. However, section 1(1)(p) goes on to also define as trade unions for the purposes of the Act two entities which would not otherwise qualify as trade unions, namely "a certified council of trade unions" and "a designated or certified employee bargaining agency". Designated or certified employee bargaining agencies are peculiar to the provisions of the Act governing provincial bargaining in the industrial, commercial and institutional sector of the construction industry and need be of no further concern in these proceedings. Councils of trade unions, however, are quite another matter.

16. A council of trade unions is defined in section 1(1)(g) of the Act as follows:

“‘council of trade unions’ includes an allied council, a trades council, a joint board and any other association of trade unions.”

Being an association of trade unions (as opposed to an association of employees) a council of trade unions would not qualify as a trade union at common law. However, the Legislature has decided that for the purposes of the *Labour Relations Act* certain councils of trade unions should be regarded as trade unions in their own right, namely, those councils which have been certified as a bargaining agent by this Board. Section 10 of the Act sets out the requirements for the certification of a council of trade unions. It is of some interest to note that due to the fact that councils of trade unions do not have employee members, section 10(3) provides that for purposes of determining whether there is sufficient membership support to certify a council of unions (and only for this purpose) “a person who is a member of any constituent trade union of a council shall be deemed by the Board to be a member of the council.”

17. The Ontario Projectionists’ Association has never been certified by this Board. Accordingly, it is not a certified council of trade unions. Further, in that it is not an “organization of employees” it does not otherwise come within the definition of a trade union. Accordingly, we are satisfied the association is not a trade union for the purposes of the Act. Not being a trade union, the association cannot be declared to be a successor trade union under section 62 of the Act. In this regard see: *Bathe & McLellan Const. Ltd.* [1969] OLRB Rep. Jan. p. 1041.

18. In our view, what the Ontario Projectionists’ Association is is an uncertified council of trade unions. The Act clearly envisages that both certified and uncertified councils of trade unions can bargain and enter into collective agreements, albeit that different considerations apply depending on whether or not the council has been certified. In this regard see sections 1(1)(e), 51, 53, and 55 of the Act.

19. The role of an uncertified council in negotiating a collective agreement was summarized by the Board in *The Board of Education for the City of Toronto* case [1982] OLRB Rep. March 496 as follows:

“It was agreed that the Council is not a certified council of trade unions as defined in section 1(1)(d). The Act contemplates that the role of an uncertified council of trade union is to act as an agent of the trade unions which it represents rather than as an independent participant and bargaining agent. The decision of the Board in *Bathe & McLellan Const. Ltd.* [1969] OLRB Rep. Jan. p. 1041, held that ‘trade union’ does not include an uncertified council of trade unions. It follows that the Council may neither hold nor exercise bargaining rights in its own name. However, the Council may act as an agent of other trade unions which possess bargaining rights.”

20. In that the Ontario Projectionists’ Association is an uncertified council of trade unions, to the extent it can act in the name of Local 432 it is only as a representative of, or agent for, Local 432. Local 432 still holds the relevant bargaining rights. This being the case, even if we were to assume that the companies could be required to negotiate with the Ontario Projectionists’ Association as agent for Local 432, there can be no valid objection to the naming of Local 432 in the requests for the appointment of a conciliation officer. In these



circumstances, we are satisfied that regardless of the matters referred to below, the Minister has the authority to appoint a conciliation officer in each of these files, and that in the requests for appointment Local 432 was quite properly named as the relevant trade union.

21. The above conclusion does not, of course, provide a total answer to the issue between the parties. The question still remains as to whether the companies can be required to bargain with the Ontario Projectionists' Association acting on behalf of Local 432 and whether the companies are required to negotiate with the association in a single round of bargaining with respect to all of the Locals which have chosen the association to act as their agent. When this question was put by the Board to counsel for Local 432, in the context of the association being an uncertified council of trade unions, as opposed to a trade union in its own right, counsel indicated that he was not prepared to make a full submission on the matter. For his part, counsel for the companies contended that although it was open to an employer to voluntarily decide to negotiate jointly with a number of locals through an uncertified council of trade unions, the employer was also at liberty to decline to do so. In that this issue was not fully argued, we are reluctant to make any final determination of the matter. However, the parties are referred to the Board's decision in the *Journal Publishing Co. of Ottawa Ltd.* [1977] OLRB Rep. June 309, where the Board appeared to indicate that although a union can select its own representative for bargaining, the issue of whether an employer will negotiate with several unions in a single set of negotiations is a matter for bargaining, and that the employer is entitled not to agree to such a procedure. The actual reasoning of the Board was as follows:

"46. The question here is whether a union, as bargaining agent of the employees, is entitled to determine the manner in which it will conduct its part of the negotiations, and the persons who will act as spokesmen at these negotiations. We consider that such an entitlement does exist, and is qualified only by the obligation on that trade union to bargain in good faith and make every reasonable effort to reach a collective agreement. Section 56 of the Act provides:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

47. This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith — the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.

49. The legality of the refusal to meet the full Council is more

problematic. It is clear that the Council had no status as a bargaining agent. The Council, therefore, was not entitled to usurp the bargaining rights of its constituent members and insist upon dealing with the individual contracts together. On the other hand, the constituent members are entitled to shape their own bargaining structure, and choose their own spokesmen when bargaining for their individual contracts. Was The Journal's refusal to meet with the Council merely a refusal to deal with the individual contracts as one package, or was it an attempt to determine the composition of the unions' bargaining team? On the evidence, we find that The Journal was not simply objecting to the discussion of the individual contracts as one package but was objecting to the bargaining structure itself. This objection, as well as the objection to McCarthy's presence at the bargaining table, constituted a failure to bargain in good faith."

22. The specific question put to the Board by the Minister was as follows:

"5. Specifically, the question is whether it is the trade union or the Ontario Projectionists Association which has the authority to bargain for the unit of employees that is the subject of the request for conciliation.

6. Pursuant to section 107 of the Act, the Minister refers to the Labour Relations Board the question which has arisen concerning his authority to make the requested appointment."

Having regard to our reasoning set out above, we are satisfied that Local 432 holds the formal bargaining rights for three units of employees and that accordingly the Minister does have the authority to make the requested appointments.

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**2040-80-U United Steelworkers of America, Complainant, Fotomat Canada Limited, Respondent.**

**Damages – Unfair Labour Practice – Measure of damages for loss of opportunity to negotiate a collective agreement – Dispute as to period of entitlement – Whether duty to mitigate monetary losses pending Board decision.**

**BEFORE:** George W. Adams, Q.C., Chairman and Board Members C. A. Ballentine and J. Wilson.

**APPEARANCES:** *James K. A. Hayes, Bram Herlich and William Mills for the complainant; and Steven J. McCormack, Peter Nalewaik and David Weeks for the respondent.*

**DECISION OF THE BOARD; July 15, 1982**

1. By decision dated October 24th, 1980, the Board determined that the respondent had bargained in bad faith and had committed a variety of other violations of the statute in addition. In its remedial order, among other things, the Board directed the respondent "to pay to all bargaining unit employees all monetary losses that the complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate a collective agreement...the said damage, if any, running to the date of the first meeting convened by the respondent" as directed by the Board in the same order. Interest on any such amount was also ordered. Subsequent to that ruling the parties met as directed between November 25th, 1980 and December 3rd, 1980. However, collective agreements were not concluded and a further complaint was filed. By decision dated February 13th, 1981, it was found that the respondent had continued to bargain in bad faith and, accordingly, the Board fashioned a second remedial order which, among other things, directed the respondent to execute the collective agreements arising out of offers and acceptances occurring on December 3rd, 1980 and "to pay all bargaining unit employees all monetary losses arising from the loss of opportunity to negotiate a collective agreement together with interest from November 25th, 1980 until the date the respondent" executed the collective agreements.

2. The Board, in its decision of October 24th, 1980, had also directed the respondent to re-employ all striking employees who made unconditional applications to return to work on or before December 1st, 1980 and that this was to be done whether or not strike replacement employees had to be transferred, laid off or terminated. The basis to this order was that the respondent had bargained in bad faith over a period exceeding that period of time during which striking employees could have returned to work pursuant to the *Labour Relations Act*. (See section 73.) The Board decided that if it failed to provide for the security of employment of the striking employees the respondent would be rewarded for its unlawful conduct. The complainant filed a fresh complaint dated December 16th, 1980 alleging non-compliance with both this order and the direction that the respondent retract its offer of February 25th, 1980 including a monetary proposal that had been unlawfully withdrawn on June 17th, 1980. As noted in paragraph one, the Board's decision of February 13th, 1981 dealt with the latter aspect of that complaint. A subsequent decision of the Board dated May 25th, 1981 pertained to the alleged non-compliance with the Board order directing the re-employment of striking employees. In that decision, the Board found that the respondent had been motivated by anti-union considerations "when it persisted in characterizing the employees' actions of December 1st, 1980 as a mass resignation and refused to allow any of the employees who were absent



without notice on Tuesday, December 2nd to continue their employment with the company". Prior to deploying the employees returning to work under the Board's direction, the respondent had held "retraining" seminars in Toronto. Certain of the employees perceived the seminars as unfair and a walkout ensued. It was the employer's characterization of the walkout as a mass resignation which the Board found to be improper. A remedial order was granted directing reinstatement of the grievors together with lost wages running from a variety of dates depending on when an employee attempted to return to work or learned that such an attempt would be futile. The different dates ran from December 3rd to December 8th, 1980.

3. By letter dated February 10th, 1982 the complainant wrote to the respondent providing particulars to its claim for monetary losses flowing from these various decisions of the Board. This claim totals in excess of \$300,000.00.

4. On the agreement of the parties, the following issues were placed before this panel of the Board for decision.

1. What is the period of entitlement over which monetary losses (arising from the loss of an opportunity to negotiate a collective agreement) should be calculated?
2. What is the appropriate "measure" of damages for this period of entitlement?
3. Were the grievors, affected by the May 25th, 1981 decision of the Board, under a duty to mitigate monetary losses pending the issuance of that decision?

5. On behalf of the complainant, it was submitted that the period of entitlement ought to run from February 25th, 1980 until all employees were properly returned to work under the decision and direction of the Board dated May 25th, 1981. With respect to the measure of damages, the complainant took great exception to the Board's obiter in *Canada Cement Lafarge*, [1981] OLRB Rep. Dec. 1722 at ¶37 wherein the panel in that case suggested the measure of loss in bargaining cases might be the difference between the terms and conditions that would have prevailed had the respondent bargained in good faith and those terms and conditions which in fact existed. The Board in that decision also expressed some reluctance to award striking employees full indemnity for monetary losses in that they may have contributed to such losses by engaging in strike activity. It was the complainant's submission that after February 25th the respondent's unlawful conduct was the only reason for the failure of a collective agreement to be negotiated and that therefore the bargaining unit employees who remained on strike were on strike only because of the unlawful actions of the respondent. It was submitted that if the Board acted on the basis of the obiter comments in *Canada Cement Lafarge*, *supra*, it would effectively "gut" the remedy devised in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 to deal with these kinds of first agreement problems. Finally, counsel for the complainant submitted that the Board should not require the grievors affected by the Board's decision of May 25th, 1981 to mitigate their losses because the respondent's failure to comply with the Board's earlier order directing their re-employment caused great confusion in the minds of the grievors. A strike was still in progress when the respondent treated the walkout as a mass resignation and that, to the grievors way of thinking, seeking a job elsewhere would have been inconsistent with the ongoing strike "atmosphere" that prevailed at that point in time. The complainant submitted that even after the February 13th, 1981 decision of the

Board directing the execution of collective agreements there remained considerable confusion and difficulty over the grievors precise legal position.

6. The respondent submitted that no unlawful conduct had been found prior to February 25th and therefore suggested that the period of monetary entitlement ought to run from a point in time somewhat after February 25th, 1980. However, no specific starting point was recommended to the Board. On the issue of measurement, counsel for the respondent relied heavily on the obiter remarks in the *Canada Cement Lafarge* case and asserted that damages for loss of opportunity to negotiate a collective agreement should not be viewed as the equivalent of a "gross wage claim" for striking employees. Finally, it was urged upon the Board to not deviate from its policy of requiring all grievors to mitigate their losses pending a determination by the Board.

7. This is the first time the Board has had to consider the details of its approach to bargaining violations first set forth in *Radio Shack, supra*. Until that point in time, the Board had tended to deal with bad faith bargaining violations by way of bargaining orders. Increasingly, however, it became clear that the bargaining order approach did not respond to the real losses experienced by unions and employees and presented no real deterrence to flagrant employer misconduct at the bargaining table. In *Radio Shack, supra*, the Board said it would evaluate the bargaining expectancy of employees who were victims of such an unfair labour practice. This case requires us to look at certain aspects of the measurement of such loss.

8. The complainant has simplified the task by limiting its claim to the level of compensation eventually negotiated with the respondent on December 3, 1981. The increases were of the order of 9% or 27 cents per hour. The complainant points out that it could have taken the position that this settlement was, itself, affected by the unlawful actions of the respondent and is not the best measure of the loss experienced by these employees. However, for its own reasons and in order to simplify matters before the Board, it has decided against taking this approach. Accordingly, we accept this upper limit in the instant case as that level of compensation the employees would have received much earlier than they did had the respondent bargained in good faith and made all reasonable efforts to enter into a collective agreement. Moreover, because collective agreements were entered into, there is no uncertainty over whether or not a collective agreement would have been agreed upon had the respondent bargained in good faith. In future cases the Board may well have to decide whether losses should be discounted to reflect any existing uncertainty and to determine how realistic a complainant's bargaining goals were on the filing of the complaint with the Board. Fortunately, this need not be done in the instant case.

9. However, we do need to decide from what point in time recoverable losses run from and precisely what losses during the relevant period ought to be recovered. The easiest point in time to determine is the point in time to which bargaining losses run. All bargaining losses can be considered as running to December 3, 1980. On that date the parties entered into a binding memorandum of agreement which the Board directed the respondent to execute in the form of collective agreements pursuant to its decision of February 13, 1981. Employees in the bargaining unit on or after that date should have been paid at the rates provided for in that memorandum of agreement. The employees reinstated by the Board's order of May 25, 1981 are therefore to be compensated at rates of wages provided for in the memorandum of agreement for a period of time commencing between December 3 to December 8, 1980 (as applicable) to the date of their actual reinstatement pursuant to the Board's order. They were

unlawfully dismissed and their reinstatement with compensation presents nothing unusual other than the issue of mitigation to be addressed below.

10. As for the starting date, counsel for the complainant submits that February 25, 1980 is most conservative in the circumstances. It can be pointed out that the first certificate was granted in February of 1979. While other certificates were granted as late as August 8, 1979 and notices to bargaining spanned March 1, 1979 to October 23, 1979, serious bargaining commenced June 28, 1979. A strike deadline was reached on October 22, 1979 and the parties were engaged in a strike impasse until February 25, 1980, the point at which the Board found the respondent to be bargaining in bad faith. No data was presented to the Board to describe "the average period of time" it takes a first agreement to be negotiated from the date of issuance of a certificate. However, if three months was thought an average or at least a reasonable period and assuming nothing unusual in the complainant's bargaining posture, it would seem reasonable to conclude that a collective agreement would have been consummated by at least the end of February. The complainant points out that when the respondent retailed its position pursuant to the Board's order of October 24, 1980 a memorandum of agreement was agreed upon in less than a week. On the other hand, there were a very limited number of pre-strike bargaining meetings and this was the product of the complainant's actions. It set a strike deadline for October 22, 1979 and went on strike with many items still on the bargaining table and with a 45 percent wage increase demand. Moreover, there had been no specific negotiations with respect to the Warden Avenue location and the complainant was seeking to cover many of the units under a single agreement. It is also unlikely that the speed at which the parties consummated an agreement in December of 1980 under "the Board's scrutiny" is a good measure of how impasse negotiations would have unfolded in February of 1980 had the intentions of the respondent been bona fide and had there been no Board involvement. Taking all these factors into account and having regard to all of the evidence before the Board, we find that, on the balance of probabilities, a collective agreement would have been entered into on or about April 1, 1980 and that bargaining losses should commence to run from this date.

11. The measure of such loss has been simplified by the complainant limiting its claim to the rates eventually negotiated but complicated by the fact that many of the employees in the bargaining unit were on strike until they returned to work pursuant to the Board's order October 24, 1980 sometime in December of 1980. In *Canada Cement Lafarge, supra*, the Board, in obiter, expressed some concern over sorting out those losses caused by a bargaining unfair labour practice and those caused by the refusal of employees to work through strike action. The Board was also anxious not to encourage striking employees to place great hopes on the Board declaring an employer's bargaining position unlawful with the accompanying expectation that the employer would be directed to save them harmless from all losses experienced including both the "bargaining expectancy" and the wage loss arising from the strike. In short, the Board cautioned trade unions against precipitous strike action with the thought that a subsequent successful unfair labour practice complaint would compensate for all losses incurred.

12. In the same decision, the Board noted that certain violations of section 15 would not usually cause monetary losses or at least such violations could best be remedied by directions not involving a monetary order. A good example would be the failure to provide certain bargaining unit data. However, this case is not one of those. In this case, the respondent's conduct at the bargaining table was calculated to avoid a collective agreement and it persisted in such conduct from February 25, 1980 to December 3, 1980. There is therefore considerable



force in the complainant's submission that the only reason that certain members of the bargaining unit were on strike after April 1, 1980 was because of the respondent's unlawful conduct. On the other hand, the complainant took its members out on strike well before the time at which it established the respondent violated the Act thereby aggravating the losses that would be sustained by these striking employees. There can also be no doubt that the complainant abandoned the bargaining table after March of 1980 preferring, in the words of its witnesses, to lobby the legislature for legislative reform on the issue of compulsory trade union membership dues. While those efforts along with, we might add, the efforts of organized labour in Ontario generally bore fruit in the form of Bill 89 given royal assent on June 17, 1980, we find it difficult to conclude that all the losses sustained from early March of 1980 until June 17, 1980 were the entire product of the respondent's actions. The complainant admitted that it abandoned collective bargaining during this period and only after June 17, 1980 did it actively pursue the complaint filed with the Board. Considering all the facts before us and having particular regard to what the Board considers a premature decision by the complainant to engage in strike action, we have concluded that the losses of bargaining unit employees, including those of striking employees, are best measured by the formula set out in *Canada Cement Lafarge, supra*, from April 1, 1980 to June 17, 1980. By this we mean the difference between what they would have received had they continued to work and those wages multiplied by the percentage increase that would have resulted from good faith bargaining (9%), i.e. "the net monetary claim". However, after June 17, 1980 we accept that all the losses of bargaining unit employees were exclusively and directly referable to the respondent's unlawful conduct and striking employees are entitled to be compensated for all losses sustained from June 17, 1980 to December 3, 1980, i.e. their "gross monetary claim". To limit grievors to a net monetary claim for this period would not properly reflect the losses sustained because of the respondent's conduct. The complaint was pursued immediately after the respondent's conduct on June 17, 1982. If the approach also constitutes a powerful disincentive to this type of first agreement violation, it is an approach well grounded in statutory policy. However, sight must not be lost of our treatment of this claim from April 1 to June 17, 1982. The Board will continue to scrutinize the conduct of a complainant trade union over the period of its claim in the same manner in future cases. While the suggested approach in *Canada Cement Lafarge, supra*, cannot now be considered a primary measurement in strike situations, it remains very much a relevant consideration. Bargaining unit employees who did not strike are, of course, only entitled to the 9 percent increase that would have resulted from good faith bargaining.

13. Finally, we have come to the conclusion that the grievors reinstated by the Board's order of May 25, 1981 would have acted reasonably in the circumstances if they did not seek work elsewhere from December 3, 1980 to February 13, 1981 when the Board directed the respondent to execute the collective agreements based on the memorandum agreement dated December 3, 1980. During that period a grievor could justifiably have concluded that the alternative to employment with the respondent was continued strike action. However, after February 13, 1981, this frame of mind would have been no longer reasonable and the grievors were obligated to mitigate their losses like all other grievors pursuing remedies under this Act. See *Little Bros. (Weston) Limited*, [1975] OLRB Rep. 83 at page 91; *Radio Shack, supra*, page 1254.

14. In summary then, the answers to the issues placed before us are:

1. The period of entitlement over which monetary losses from

bargaining violations are to be calculated is from April 1, 1980 to December 3, 1980.

2. The appropriate measure from April 1, 1980 to June 17, 1980 for all bargaining unit employees is the net monetary claim as described herein and the gross monetary claim is appropriate in relation to striking employees from June 18, 1980 until December 3, 1980.
  3. After February 13, 1981 grievors affected by the Board's decision of May 25, 1981 were obligated to take reasonable steps to mitigate their losses.
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**0482-82-M** International Brotherhood of Painters and Allied Trades, Local 1891, Applicant, v. **Mar-ot Painting Contractors Limited** and **Ionview Construction Limited**, Respondents

**Construction Industry – Practice and Procedure – Witness – Witnesses served sub-poena twice failing to appear – Board issuing bench warrant for arrest and production of witnesses at hearing – Procedure outlined in *Casalbil* followed**

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members L. Hemsworth and M.J. Fenwick.

**APPEARANCES:** *B. Fishbein and S. Pantorotto for the applicant; no one appeared for the respondents.*

**DECISION OF THE BOARD;** July 22, 1982

1. This is an application under section 124 of the *Labour Relations Act* in which the applicant union alleges that the respondents have failed to comply with the collective agreement by which they are bound. This is one of two related applications between these parties currently before the Board. The other application (Board File 0390-82-R) involves the corporate relationship between the two respondents, and the union's allegation that either section 63 or section 1(4) of the Act applies. For the purpose of this interim decision, it is unnecessary to consider the details of either of these two applications.

2. The section 63/1(4) application was made on May 25, 1982, and a hearing date fixed for June 23, 1982. The instant application under section 124 was made on June 9, 1982, and since the parties were the same and the issues arguably related, the hearing date was fixed for June 23, 1982. In accordance with its usual practice under section 124, the Board appointed an officer to meet with the parties to endeavour to effect a settlement of the matters in dispute between them. The Board Officer notified the parties of a meeting to be convened at the Board's offices in Toronto at 10:00 a.m. on June 17, 1982. The respondents did not appear at this meeting.

3. Pursuant to its application under section 63/1(4), the union served subpoenas on Ottavio Rizzo and Maria Rizzo to give evidence in respect of these matters returnable on the hearing date June 23, 1982. The Board is satisfied on the basis of the evidence before it that the Rizzo's were properly served. Neither Ottavio Rizzo nor Maria Rizzo appeared to give evidence as required by the subpoena. The hearing of both applications was adjourned to July 19, 1982. Meanwhile, the applicant union sought to serve the Rizzo's with a second subpoena. This was accomplished on June 24, 1982, and as before the Board is satisfied on the basis of the evidence before it that they were properly served and required to appear before the hearing of this section 124 application. As before, both the section 63/1(4) and the section 124 application (i.e. the instant case) were scheduled for hearing on the same day. Once again, neither Maria Rizzo nor Ottavio Rizzo appeared.

4. The union requests that the Board issue a bench warrant to ensure that these witnesses and their evidence are available.

5. The authority of the Board to issue the relief which the applicant union requests is based upon section 103(2)(a) of the *Labour Relations Act* (formerly section 92(2)(a)) which reads as follows:

(2) Without limiting the generality of subsection (1), the Board has the power,

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases.

The Board's power to issue a bench warrant pursuant to that section was recently discussed in *Casalbil Contractor Limited*, [1980] OLRB Rep. Sept. 1278 which, as in the present case involved an application under section 124 (then section 112(a)) of the Act. At page 1278-1279 the Board commented:

"3. In proceedings under section 112a, the Board, by virtue of sections 92(2)(a), 112a(3) and 37(7) of *The Labour Relations Act*, has the power to "... to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath ... in the same manner as a court of record in civil cases." The Board is acting as an arbitrator when dealing with matters under section 112a of the Act. The enforcement mechanisms contained in sections 12 and 13 of *The Statutory Powers Procedure Act* are unavailable to the Board in these proceedings because *The Statutory Powers Procedure Act* does not apply to arbitrators under *The Labour Relations Act*. (See section 3(2)(d) of *The Statutory Powers Procedure Act*, and *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95*, (1979), 25 O.R. (2d)8). Thus, the enforcement of the Board's process is left entirely to the Board acting under the authority conferred upon it by *The Labour Relations Act*.



4. The Court in *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, supra*, stated at page 13:

‘... the purpose of the proceedings under s. 112a was to provide a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. It is unnecessary for us to answer the question raised before us as to the appropriate procedures to be followed by the Board under s. 112a with respect issue of summonses or subpoenas and the enforcement therefore, but we are satisfied that the Act itself provides a method of enforcing the attendance of witnesses and the production of documents that could be applied with much greater speed in the case of a witness like Bittenbinder than is involved in an application by way of stated case to this Court under s. 13 of the *Statutory Powers Procedure Act*, 1971.’

The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3rd) 114-366, paragraph 673; Rule 275, Supreme Court of Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board may, therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.”

6. The Board is satisfied that Ottavio and Maria Rizzo have twice been duly served with a subpoena and conduct money requiring their attendance at a hearing before the Board, and have twice failed to appear. In the second instance, the subpoena was issued pursuant to an application under section 124 of the Act and the Board is satisfied that the procedure outlined in *Casalbil Contractor Limited, supra*, is the appropriate one to be followed. The

Board is further satisfied that the presence of Maria and Ottavio Rizzo is material to the ends of justice. Therefore, the Board hereby issues a warrant for the arrest of Maria and Ottavio Rizzo directed to the sherrifs and other peace officers in the Province of Ontario to arrest and bring the said Maria and Ottavio Rizzo before the Board at the continuation of its hearing in this matter at the Board's hearing rooms on the 6th floor of 400 University Avenue in the City of Toronto on the 31st day of August, 1982.

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**2490-81-R** Labourers' International Union of North America, Local 607, Applicant, v. **Nicholls-Radtke & Associates Limited**, Respondent, v. The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener.

Collective Agreement – Construction Industry – Practice and Procedure – Intervener's collective agreement signed at time when no employees in unit – Whether amounting to employer support for union – Whether valid collective agreement – Whether intervener permitted to intervene.

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members H.J.F. Ade and B. L. Armstrong.

**APPEARANCES:** *A. M. Minsky for the applicant; S. C. Bernardo for the respondent; Laurence C. Arnold for the intervener.*

**DECISION OF THE BOARD;** July 23, 1982

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The applicant has challenged the status of the intervener to intervene in this matter. The matter was listed for hearing. Prior to the hearing in this matter the parties agreed to a Statement of Facts to be put before the Board. That agreement is as follows:

"The above named parties agree as follows:

1. On October 8, 1975 Local 2693 and the respondent entered into an agreement (Exhibit A) which purported to incorporate the bargaining unit and other terms and conditions of the then current collective agreement between the General Contractors Division of the Construction Association of Thunder Bay Inc. and Local 2693 (Exhibit B).
2. On October 8, 1975 the respondent had not commenced a proposed project at GERALTON — TCPL Station 80 (Project) which was to be its first project in any of Board geographic areas 22, 23, or 24. The respondent had no employees in the purported bargaining unit contained in Exhibits 'A' and 'B' on October 8, 1975.

3. The agreement was signed on the understanding that Local 2693 would supply workers if and when requested to do so by the respondent to the project which could be commenced at a later date.
4. The project commenced on October 4, 1975 and two Local 2693 members were hired and commenced employment on the project (one each) on October 15 and 16, 1975. From and after October 16, 1975 there were at least two members of Local 2693 employed in the bargaining unit on the project.
5. The Agreement (Exhibit A) is the first and only agreement ever signed by and between the respondent and Local 2693.
6. The respondent is not now nor has it ever been a member of the General Contractors Division of the Construction Association of Thunder Bay.
7. The parties specifically reserve their right to make any submissions whatsoever as to the conclusions that the Board should draw from this Agreement to Fact and the issue before the Board is whether Exhibit 'A' which purports to incorporate Exhibit 'B' constitutes a collective agreement under the Labour Relations Act."

The exhibit 'B' referred to is a standard area agreement between the Construction Association of Thunder Bay Inc. and the intervener Local 2693. Exhibit 'A' is a standardized "short form agreement" which reads as follows:

"AGREEMENT entered into this 8th day of OCTOBER, 1975.

between

THE FIRM OF NICHOLLS RADTKE ASSOCIATE LIMITED

1425 Bishop St. N., CAMBRIDGE, Ontario.

hereinafter referred to as the "COMPANY"

and

THE LUMBER & SAWMILL WORKERS' UNION, LOCAL 2693, of the United Brotherhood of Carpenters and Joiners of America, Thunder Bay, Ontario,

hereinafter referred to as the "UNION".

WHEREAS: The Union and the General Contractors Division of the Construction Association of Thunder Bay Incorporated, negotiate and establish by agreement certain terms and conditions of employment, and



WHEREAS: The parties hereto desire to promote and maintain harmonious relations between the Employer and the Employee:

WITNESSETH: That the parties hereto accept and agree each with the other to be bound by all terms, rates and conditions contained in the current agreement between the Union and the General Contractors Division of the Construction Association of Thunder Bay Incorporated, and as it may be changed or renewed from time to time by negotiations and/or by lapse of time, to the same extent as though the Company has executed such agreements as a member of the General Contractors Division of the Construction Association of Thunder Bay Incorporated, and such terms, rates and conditions are hereby made part of this agreement and effective on all projects of the Company in the Districts of Kenora (including Patricia Portion), Rainy River and Thunder Bay.

This agreement shall be effective on date of signing and shall remain in effect for a term of not less than one year and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing not less than ninety (90) days prior to the expiration date that it desires to change, add to, or amend this Agreement."

3. On the basis of the agreed Statement of Facts, the parties argued the status of the Lumber and Sawmill Workers' Union, Local 2693 to intervene in the present application.

4. The position taken by the applicant is that the intervener never acquired bargaining rights by the short form agreement, Exhibit 'A', since it is not a valid collective agreement (notwithstanding the fact that this was in 1975), since it was the first and only collective agreement ever signed between the parties. Thus the applicant argues that the intervener never did and does not now have bargaining rights with respect to the respondent employer. In respect of its position, the applicant relies primarily on three cases. The *Sunrise Paving and Construction Co. Ltd.* case, 72 CLLC ¶16,060; The *C. Strauss (1973) Limited* case, [1975] OLRB Rep. July, 581; and an unreported decision of the Board in *Volens Contractors Limited*, OLRB File No. 0802-75-R, decision dated 17th November, 1975. In both the *Sunrise Paving* case, *supra* and the *C. Strauss* case, *supra*, like the present case, the same issue was argued on the basis of an agreed Statement of Facts. The Facts in the *C. Strauss* cases, *supra* are very similar to the facts in the present case. There the agreement was entered into some three days before employees commenced working under the agreement. That is, the agreement was clearly entered into at a time when the employer had no employees. In denying the intervener status, the Board quoted from the *Sunrise Paving* case, *supra* as follows:

"15. It is readily apparent that the alleged collective bargaining relationship between the respondent and the intervener arose as a result of an arrangement between them without reference to or consultation with the employees who would be affected by this arrangement. Clearly, the respondent selected the intervener as the bargaining agent for its future employees. Such an arrangement strikes at the very spirit of the Labour Relations Act which envisages the selection of a bargaining agent by the employees concerned without the intervention or influence of their employer.

16. Employees of the respondent did not have an opportunity to select their bargaining agent. The Board finds that the actions of the respondent in all of the circumstances of this application constitute other support to a trade union (the intervener) within the meaning of section 40(a) of the Labour Relations Act. The Board is given the jurisdiction to consider the question of support by an employer for a trade union. Certain consequences flow from the Board making a finding that an employer has contributed other support to a trade union. This consequence is set forth in section 40 of the Labour Relations Act.”

5. In both the *Sunrise Paving* case, and the *C. Strauss* case, the Board found that the signing of a collective agreement at a time when there were no employees in the bargaining unit, constituted employer support of the trade union within the meaning of then section 40(a) now section 48(a). That section reads as follows:

“if an employer or an employers’ organization participated in the formation or administration of the trade union or if an employer or an employers’ organization contributed financial or other support to the trade union; or ...”

In effect, however, the *C. Strauss* case is distinguishable from the *Sunrise Paving* case in one important aspect. In *Sunrise Paving* it was clear that the employer, when he eventually employed persons under the agreement in question, employed employees who had not been members of the intervening union. That is, non-members were required to become members of the union by virtue of the collective agreement in question. In the *C. Strauss* case, subsequent to the signing of the agreement, members were referred from the signatory union to the employers’ job sites. The present case goes even farther in that the agreed Statement of Facts points out that this was an intention of the parties in the present case, namely to supply employees to the work site after the proposed agreement was signed.

6. The intervener argued that the present case was outside the *Sunrise Paving*, *supra* policy in that, as noted in the Agreement of Facts, the agreement in Exhibit ‘A’ was signed on the understanding that the intervener would supply workers if and when requested to do so by the respondent, to the project which would be commenced at a later date. From this the intervener argues that the intention of the parties was that the document signed on October 8th was signed with an intention to become effective when the project in question started. Counsel for the intervener argues that there is nothing sinister in these events, that the document was signed in contemplation of members being employed on the project. He argues this is a common practice in the construction industry and that to interpret section 1(1)(e) as requiring employees at the date of signing is a simplistic approach which denies the realities of the construction industry since a number of construction unions take the view that they will only supply members if there is a collective agreement in place.

7. Counsel went on to argue that in the Board decision in *Brayshaws Steel Limited*, [1970] OLRB Rep. Feb. 1297, the Board had found a valid collective agreement notwithstanding the fact that there were no employees in the bargaining unit at the time the collective agreement was signed. Further, although that decision was quashed on appeal, the Board’s finding concerning a collective agreement was specifically upheld by the courts. Clearly, the *Brayshaws* case, *supra* does not apply in the present situation since, in that case,

the union that signed the agreement had, in the past, held bargaining rights, and held bargaining rights at the time the agreement was signed. At page 1303 paragraph 9 of the *Brayshaws* decision, *supra* the Board stated:

“Having found that the intervener did have bargaining rights at the time the agreement was entered into it had the right to represent employees in the bargaining unit and, notwithstanding the fact that there were no employees at that time, the company properly recognized the right of the intervener to represent its employees and to enter into a collective agreement. While such agreement might not be immediately effective, it would become so when there were employees in the bargaining unit, and we find nothing improper in that, particularly in these circumstances where there was an intended transfer of operations and employees. We find therefore that the agreement between the intervener and the respondent was a collective agreement within the meaning of section 1(1)(c) of the Act.”

8. Counsel for the intervener also argued that this was an estoppel situation since the agreement had in fact been applied without challenge. In this context he urged the Board to apply a doctrine of estoppel to find that the collective agreement could not now be challenged. While there may very well be a valid estoppel argument as between the intervener and the respondent in the present case, such an estoppel cannot go the issue raised by the applicant in the present matter. The effect of an estoppel is that in a particular proceeding a party is not entitled to make a certain argument. Thus, for instance, in a proceeding between the intervener and the respondent, if the respondent were to deny that there was a collective agreement, the Board, for instance in an arbitration under section 124 of the Act, might very well find that the respondent by virtue of its conduct was estopped from arguing that there was no collective agreement because there were no employees in the bargaining unit at the time the agreement was entered into. That, however, is a matter between the respondent and the intervener. With respect to the applicant, the applicant's argument is not limited by any past conduct on its part or by the respondent or intervener.

9. In view of the arguments put forward by the applicant and the intervener, the present case comes down to a very basic policy choice for this Board. Should the Board continue to follow the policy set out in the *C. Strauss* case, that the mere signing of a collective agreement, when there are no employees in the bargaining unit, of itself constitutes employer support for a trade union? The agreed Statement of Facts signed by the parties in this matter indicates in paragraph three that the agreement was signed on the understanding that Local 2693 would supply workers if and when requested to do so by the respondent to the project which would be commenced at a later date. In making such an agreement, the intervener was merely acting as a lot of construction trade unions do in attempting to obtain work for its members. In this regard, reference should be had to section 46 of the Act which deals with certain permitted provisions of collective agreements, in particular union security provisions.

Subsection 1 of section 46 reads as follows:

“46.-(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in its provisions,

(a) *for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement*



*or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;*

- (b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;
- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefore."

(emphasis added)

Subsection 4 reads as follows:

"(4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions *requiring, as a condition of employment, membership in the trade union* that is a party to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,

- (a) where the trade union has been certified as the bargaining agent of the employees of the employer in the bargaining unit; or
- (b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year; or
- (c) where the employer becomes a member of an employers' organization that has entered into a collective agreement with the trade union or council of trade unions containing such a provision and agrees with the trade union or council of trade unions to be bound by such agreement; or
- (d) where the employer and his employees in the bargaining unit are engaged in the construction, alteration, decoration, repair or demolition of a building, structure, road, sewer, water or gas main, pipe line, tunnel, bridge, canal, or other work at the site thereof."

(emphasis added)

It is of course obvious that section 46(4)(d) uses the exact same language as clause 1(1)(f), the definition of construction industry in the Act. Taken together, subsection 1 and subsection 4

of section 46 can be said to contemplate as permissive, provisions in a construction industry collective agreement requiring as a condition of employment membership in the trade union. And further, the structure of subsection 4 seems to indicate that, in the construction industry, compulsory membership or a preferential hiring clause may be inserted into a first collective agreement signed when voluntary recognition creates the bargaining rights which the union holds. If the Act contemplates as permissive conditions in construction collective agreements, preference of employment for union members extending to membership in a trade union as pre-condition of employment, are we to find that the signing of such an agreement in the absence of any other factor is to be interpreted as support for the trade union within the meaning of section 48(a)? In the *Sunrise Paving* case, for instance, there was evidence upon which such a conclusion could be drawn. That is, the employer on hiring employees did the membership recruiting for the union. However, in the *C. Strauss* case, and in the present case, no such implication arises.

10. Both the Supreme Court of Canada in *Re International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al.* (1978), 89 D.L.R. (3d) 289, and the Ontario Court of Appeal in *Re Blouin Drywall Ltd.* (1975) 57 D.L.R. (3d) 199, have recognized that certain types of collective agreements, one in the longshoring industry, the second in the construction industry, cause problems with the word "employees" in that persons with no direct employment relationship may be employees because they are members of the union. In the *Blouin Drywall Ltd.*, case, *supra* Brook J. A. commented as follows:

"While ss. 37(9) and 42 of the Labour Relations Act do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond "employees", I do not regard these sections as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee members of the union and that such rights and benefits may then be the subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement. Collective agreements in this industry have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

Relevant to this case is the fact that s. 38(1)(a) of the statute contemplates the employer's covenant to give preference in hiring the union members. That section says:

'38(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

No doubt the provision contemplated by the statute is, indeed, union security; but equally certain in my view is that it anticipates a covenant in favour of those who are union members, unemployed and available and qualified to do the work, which covenant should be enforced in their favour. The Divisional Court held that as a primary purpose the clause was union security, the union could not claim on behalf of non-employee union members. With deference, in my view one cannot sever this clause into primary and secondary purposes and give it any effect at all. The enforcement of the preferential hiring of unemployed union members is the crux of the union security. The employment of its members is an assurance of union strength of the members collectively can only result in the loss of union strength.”

Indeed, as counsel for the intervener points out, there was nothing sinister in the making of the agreement referred to in paragraph three of the agreed Statement of Facts.

11. In the *Sunrise Paving* case, the Board commented that “the employees of the respondent did not have an opportunity to select their bargaining agent”. While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union’s hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the stated policy of the Board in the *C. Strauss* case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site. Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervener on the 16th of October, when there were two members of the intervener union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

12. On the other hand, it may be argued that the *C. Strauss* case, simply recognizes a limitation on the acquisition of bargaining rights that is implicit in the Act, namely, there must be employees in the employ of the employer at the time bargaining rights are acquired. Obviously, this is so in the case of certification, but also in the case of voluntary recognition. In this regard this latent policy in the *Labour Relations Act* is implicit in section 121 of the Act which reads as follows:

“An agreement in writing between an employer or employers’ organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or council of trade unions that is entitled to require the employer or the employers’ organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the



bargaining unit or units affected at the time the agreement was entered into.”

That provision primarily recognizes that special circumstances are required for the construction industry due to the cyclical nature of employment in the construction industry. There may be times when an employer has no employees, but nevertheless as a matter of the on-going labour relations in the construction industry, the employer is bound by the results of collective bargaining. It would appear that such a provision which deems a collective agreement to be valid when there are no employees in the bargaining unit would only be necessary if in fact there was a problem with the validity of collective agreements signed when there are no employees in the bargaining unit.

13. It is our view, however, that when the document in the present case was signed on October 8th, 1975, the respondent and the intervener were performing two distinct, but related acts at the same time. The respondent employer was voluntarily recognizing the intervener union as the exclusive bargaining agent for employees in the bargaining unit, and contemporaneously agreed to certain terms and conditions of employment for those employees who would be affected by the recognition agreement. There would have been no arguable issue in this case as to the validity of the collective agreement if the respondent employer had signed it *after* the union’s members had reported for work. For this Board to hold that, in the circumstances of this case, where no other persons were working or had worked for the employer in the bargaining unit, *and* no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act.

14. The respondent employer required persons to do work for it, and went to the intervener union, who had members available to do that work, for those persons. In the same way that the Courts in the *Blouin Drywall* and *Maritime Employers Association* cases, *supra*, held that members of a trade union who are not actually working for a particular employer but are associated with the union’s hiring hall to seek work are employees, the members of the intervener trade union on whose behalf the collective agreement was entered into are “employees” whom the union represents. Section 121 of the Act indicates that an agreement in writing which is signed when there are no employees in the bargaining unit is deemed to be a collective agreement if, for example, the union is renewing a collective agreement or making a new agreement after an earlier collective agreement had expired, thus implying that an agreement signed after voluntary recognition when there are no employees in the unit may not be a collective agreement. The Board notes that section 121 of the Act merely deems an agreement in writing to be a collective agreement under certain circumstances; it does not provide that an agreement signed when there are no employees in the unit is not a collective agreement. (See section 48 of the Act for a specific provision deeming an agreement not to be a collective agreement). Therefore, section 121 of the Act has no application to the facts of this case.

15. The Board in *C. Strauss and Volens* held that there was no collective agreement by applying section 40 [now 48] after finding that the union had received “other support” from the employer when it signed a collective agreement without employees in the bargaining unit.

We are satisfied that, in the circumstances of this case, although the agreement was signed on October 8th, 1975, when, as the parties have stipulated, "The respondent had no employees in the purported bargaining unit . . .", the intervener union did not receive "other support" from the employer. To the contrary, the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not "other support" from an employer which calls for the application of section 48 of the Act.

16. Counsel for the applicant suggested that the *C. Strauss* case, *supra*, is a necessary Board policy if the Board is not to effectively exempt construction unions from the operation of section 60 of the Act. That section provides in subsection 1 for an application for termination during the first year of an agreement after voluntary recognition. We think rather that section 60 provides the sort of protection necessary to go along with a finding that a collective agreement signed in the circumstances of the present case is not the result of some agreement between employer and the trade union subverting the rights of employees as, for instance, in the *Sunrise Paving* case. The Board therefore finds that the intervener had a collective bargaining relationship with the respondent in October, 1975.

17. The Registrar is directed to list the matter for continuation of hearing.

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## **2571-81-R Gilles Mathon and Other Employees of Northland Glass and Metal Limited, Applicants, v. The International Brotherhood of Painters and Allied Trades Local 1904, Respondent**

**Petition – Practice and Procedure – Termination – Application describing unit as limited to ICI sector – Petition making no reference to sectors – Whether Board permitting amendment of application – Employer providing applicant with name of lawyer – Not affecting voluntariness of petition**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and M. J. Fenwick.

**APPEARANCES:** *William A. Brunton and Gilles Mathon for the applicants; Armando Colafranceschi and J. Bergfret for the respondent.*

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER J. WILSON; July 13, 1982**

1. The applicant has applied under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. The application as filed named as respondents The

International Brotherhood of Painters and Allied Trades, Local 1904, The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, hereafter referred to respectively as Local 1904; the Brotherhood and the Council. The application described, in paragraph 3 thereof, the unit of employees for which the respondents are alleged to be the bargaining agents in the following terms:

All employees (Journeymen Glazier Metal Mechanics, Working Foremen, Lead Hands, Apprentices, Glaziers, Installers or Glass Cutters) employed in the Province of Ontario by Northland Glass and Metal Limited in the Industrial, Commercial and Institutional sector of the Construction Industry for whom the respondents has [sic] bargaining rights.

The statement of desire filed in support of the application purports to describe in the following terms the wishes of the employees who signed it:

We, the undersigned employees of Northland Glass and Metal Limited (North Bay, Ontario), hereby signify and record that we, individually and collectively, no longer wish to be represented by The International Brotherhood of Painters and Allied Trades, The Ontario Council of the International Brotherhood of Painters and Allied Trades, or any other trade union. Our signatures to this document are in support of an application for a declaration by the Ontario Labour Relations Board that the International Brotherhood of Painters and Allied Trades no longer represents the employees of Northland Glass and Metal Limited and for an order of the Board terminating the bargaining rights of that Union as they apply to the undersigned.

• • •

3. In the course of dealing with certain preliminary issues, counsel for the applicant advised the Board that it was the applicant's intent to seek a declaration terminating all of the bargaining rights held by the respondents on the date when the application was made and he requested leave of the Board to amend the application to make that clear, notwithstanding the fact that the application describes the unit of employees in terms of the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The Board heard the representations of the parties on this request. Having regard for their representations and for the fact that the statement of desire is without reference to sectors of the construction industry, the Board was satisfied that it was the intent of the applicant to seek a declaration terminating all bargaining rights held by the respondents with respect to the employees of the employer Northland Glass and Metal Limited. Accordingly, the Board consented to the amendment of the application to cover all bargaining rights held by the respondents with respect to the employees of the employer on the date when the application was made.

4. The parties were agreed that, as of the application date, they were bound to a collective agreement signed August 15, 1979 between the employer and Local 1904 for a term of May 1st, 1978 to April 30th, 1980, which has continued in effect from year to year since April 30th, 1980 pursuant to Article XXI - Termination of the agreement. The recognition clause of that agreement describes Local 1904's bargaining rights in the following terms:



2.01 The company recognizes the Union as the sole collective bargaining agency for all its employees working at and out of (North Bay Branch) save and except supervisors, office and sales staff.

The parties were also agreed, to the extent that the respondents hold bargaining rights for the employees of the employer, it was with respect to a unit of employees described in the above terms. They were not agreed, however, whether that bargaining unit included bargaining rights in the industrial, commercial and institutional sector of the construction industry. Counsel for the applicant took the position that it did. The respondents not only claimed that they held no bargaining rights for that sector, they claimed that the collective agreement between the employer and Local 1904 could not cover the industrial, commercial and institutional sector by force of statute.

5. In this respect, section 146 of the Act provides in part as follows:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, *no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.*

(emphasis added)

Clause (e) of s. 137(1) of the Act defines a provincial agreement in the following terms:

(e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e). 1977, c. 31, s. 3, part.

6. The Brotherhood and the Council together comprise a designated employee bargaining agency under the province-wide bargaining provisions of the Act. Local 1904 is an

affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act represented in collective bargaining with respect to the industrial, commercial and institutional sector of the construction industry by the employee bargaining agency. It is Local 1904 which entered into the collective agreement in August 1979 with the employer. That agreement clearly does not satisfy the definition above of a provincial agreement and the Board finds accordingly that it is not a provincial agreement. It follows, therefore, to the extent that the agreement might purport to be an agreement or other arrangement which relates to the industrial, commercial and institutional sector, it would be null and void pursuant to s. 146(2) of the Act. Thus the Board finds that it is not an agreement which pertains to that sector.

7. One effect of the agreement between the employer and Local 1904 at the time it was entered into, was a granting by the employer of voluntary recognition of Local 1904 as bargaining agent of the employer's employees coming within the bargaining unit described in the recognition clause. That clause is certainly broad enough to encompass employees employed in the industrial, commercial and institutional sector. Local 1904, however, asserts no claim for bargaining rights in that sector. The agreement contains no specific undertaking either of a grant of bargaining rights for that sector or to be bound by the terms of the applicable provincial agreement. Nor is there any evidence before the Board that the parties to the agreement have conducted their relationship as though Local 1904 held such rights. The Board finds, therefore, that the agreement did not confer on Local 1904 bargaining rights in the industrial, commercial and institutional sector. Since that agreement is the only evidence before the Board of the bargaining rights held by any of the respondents and since those rights are held by Local 1904 alone, the Brotherhood and the Council do not hold bargaining rights for the employees of the employer affected by this application and are not respondents to the application. It is for these reasons that the style of cause of the application was amended to name as the respondent The International Brotherhood of Painters and Allied Trades Local 1904.

8. The applicant, Gilles Mathon, testified at the hearing as to the origin, preparation and circulation of the statement of desire filed in support of the application. He was the originator of the statement, had it prepared by his solicitor and solicited and witnessed the signatures, other than his own, on the statement. He signed the statement in his solicitor's office and his signature was witnessed by the secretary in the office. The document was in Mathon's possession at all times between the time he picked up it from his solicitor and returned it to him for filing with the Board. At the time he returned the petition to his solicitor he also signed the application which had been previously prepared for him by his solicitor and filled in the place and day of the month of filing.

9. The application was filed March 8th, 1982. It came on for hearing June 28th, 1982 after having been scheduled for hearing on earlier dates and adjourned by agreement of the parties. While Mathon experienced some difficulty with recalling precise dates and times and the sequence in which certain events occurred, the Board is satisfied from his testimony with the manner in which the statement was circulated and the signatures thereon were obtained. The only area of concern with the document is whether it originated as a result of the voluntary wishes of those employees who signed it.

10. Mathon told the Board that he had made an earlier inquiry at the request of fellow employees about applying for termination of the bargaining rights held by Local 1904. Those inquiries led them to believe that it was untimely to make the application and no further action was taken. Further discussions amongst the employees led to the filing of the application at

hand. They also talked about the need to have a lawyer represent them in making the application. Mathon, who works in the shop and, as a result, has regular contact with the employer about work matters, mentioned to him on one such occasion that the employees were going to seek to decertify Local 1904 and asked him if he knew a lawyer who could represent them. The employer gave the name of counsel for the applicant and told him that he could find his telephone number in the directory. There was no further discussion then or later between the applicant and the employer. Mathon contacted counsel and arranged with him to prepare the statement of desire which was ultimately filed in support of this application. Mathon testified that he did not at any time after obtaining the name of counsel from his employer through until this application was made have any discussions with his employer about the application. Nor is there any evidence that such discussions took place, notwithstanding the fact that Local 1904 in its reply stated its belief that the company had instigated the application.

11. While Mathon's request of the employer for the name of a lawyer to assist the employees with their application raises concerns about the voluntariness of the statement, standing alone it is not sufficient to indicate that the statement of desire was inspired, fostered or instigated by management influence. This is not a situation in which there has been some sudden, unexplained change in the intent of the employees which may happen in an application for certification when employees who have recently signed application cards in support of a trade union, shortly thereafter sign a petition against representation by that union. These employees have been represented by Local 1904 since August 1979 and, according to the evidence before the Board, had earlier thoughts about seeking to terminate its bargaining rights only to believe that such an application would have been untimely. In these circumstances, the Board finds that the origin of the statement of desire in support of the application is free of any management influence. Therefore, the Board finds the statement of desire to be a voluntary statement of the wishes of those employees who signed it.

12. The Board is satisfied, therefore, that not less than forty-five per cent of the employees of Northland Glass and Metal Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on March 24, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the said Act.

13. The Board directs that a representation vote be taken of the employees of Northland Glass and Metal Limited. Those eligible to vote are all employees working at and out of the employer's North Bay Branch, save and except supervisors, office and sales staff, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

14. Voters will be asked to indicate whether they wish to be represented by The International Brotherhood of Painters and Allied Trades, Local 1904 in their employment relations with Northland Glass and Metal Limited.

15. The matter is referred to the Registrar.



**DECISION OF BOARD MEMBER M. J. FENWICK;**

1. I dissent. This application for termination of bargaining rights is not free from employer involvement.
  2. Gilles Mathon, a seven-year employee in the company's service maintenance department and sponsor of the application for termination of bargaining rights testified that he went to see his boss, a Mr. Carr. He told him the employees wanted to decertify the union. Mathon asked his boss for the name of a lawyer who could act on behalf of the bargaining unit employees in the termination proceedings.
  3. Carr gave Mathon the name of William A. Brunton and told him he could find his telephone number in the telephone directory.
  4. Consequently, Mathon saw Brunton who drafted the petition for Mathon's use in the shop.
  5. Mathon was a union steward in the shop. He also indicated he had called the Ontario Labour Relations Board office in 1980 seeking information on termination procedures. He claimed that someone at the Ontario Labour Relations Board informed him that such a move would be untimely at that time.
  6. As such Mathon could not be said to be uninformed about Board procedures. In spite of this he felt obliged to inform his employer about his decertification plans and asked for the name of a lawyer who could handle the termination application.
  7. In view of the employer involvement in this case I would have dismissed the application for termination of bargaining rights.
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**0674-82-JD** Labourers' International Union of North America Ontario Provincial District Council on its own behalf and on behalf of all its affiliated Local Unions in the Province of Ontario, and Labourers International Union of North America, Complainants, v. **O.J. Pipelines Ltd.**, The Pipeline Contractors Association of Canada, The International Union of Operating Engineers, and The International Union of Operating Engineers, Local 793, Respondents.

**Jurisdictional Dispute – Dispute between two unions – Collective agreements of both unions must refer jurisdictional disputes to mutually accepted tribunal before labour board jurisdiction excluded – No specific reference to jurisdictional dispute in one agreement – Board having jurisdiction**

**BEFORE:** R. A. Furness, Vice-Chairman and Board Members C. A. Ballentine and J. Wilson.

**APPEARANCES:** *J. Sack, Q.C., Lorne Richmond, Tom Connolly and Ugo Rossini for the complainants; P.M. Rusak and N. Waldbillg for O.J. Pipelines Ltd., no one for the Pipeline Contractors Association of Canada; Laurence C. Arnold, Paul Falzone and Phil Gauthier for the International Union of Operating Engineers and the International Union of Operating Engineers, Local 793.*

#### **DECISION OF THE BOARD; July 30, 1982**

1. The complainants have requested that the Board issue a direction under section 91 of the Act with respect to “all work in connection with sand blasting on the O.J. Pipelines Ltd. project currently under way between Pembroke and North Bay, Ontario.”

2. A pre-hearing conference was scheduled for July 26, 1982. However, the International Union of Operating Engineers (the “IUOE”) and the International Union of Operating Engineers, Local 793 (“Local 793”) raised a preliminary objection to the jurisdiction of the Board. At the hearing the IUOE and Local 793 argued that the parties had provided, pursuant to certain collective agreements, for a method of resolving jurisdictional disputes in the form of the jurisdictional committee of the Canadian Pipeline Advisory Council. The IUOE and Local 793 argued that since the parties had entered into collective agreements that contain a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them, the Board did not have the jurisdiction to inquire into this complaint pursuant to section 91(14). The complainants argued that the Board did have jurisdiction to entertain this complaint. O.J. Pipelines Ltd. informed the Board that it neither wished to adduce evidence nor address argument on the question of the jurisdiction of the Board to entertain the complaint.

3. After hearing the evidence and representations of the parties on July 26, 1982 the Board informed the parties that it had determined that it had jurisdiction to entertain this complaint and that written reasons would be subsequently given.

4. The Pipeline Contractors Association of Canada (the “Association”) has collective agreements with the IUOE and its local unions; the Labourers International Union of North America (“LIUNA”) and its local unions; the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America ("Teamsters") and its local unions; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("UA") and its locals. These collective agreements cover the essential trades engaged in the work of laying pipelines.

5. Article XVI of the LIUNA's collective agreement states:

*Article XVI  
Canadian Pipeline Advisory Council*

There shall be maintained throughout the term of this Agreement a Canadian Pipeline Advisory Council consisting of one representative of the Labourers International Union of North America, one representative of the International Union of Operating Engineers, one representative of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and one representative of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and an equal number of representatives of the Association. The Council shall act whenever possible to settle matters of dispute which arise from time to time and any other matters concerning the harmonious relationships between the Parties hereto.

- Article XVI of the IUOE's collective agreement states:

*Article XVI  
Canadian Pipeline Advisory Council*

There shall be maintained throughout the term of this Agreement a Canadian Pipeline Advisory Council consisting of one International Representative of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, one International Representative of the International Union of Operating Engineers, one International Representative of the Laborers International Union of North America and one International Representative of Teamsters Chauffeurs, Warehousemen and Helpers of America, together with an equal number of representatives of the Association. The Council shall act, whenever possible to settle matters in dispute which arise from time to time and any other matters concerning the harmonious relationships between the Parties hereto under the terms and provisions of this Agreement.

- In addition, the IUOE's collective agreement also contains the following article XIV:

*Article XIV  
Work Stoppages, Secondary Boycotts  
and Jurisdictional Disputes*

- A. There shall be during the term of this Agreement and as to any work



covered hereby, no slowdown, stoppage of work, no strike and no lockout over the terms and conditions of this Agreement, it being the good faith and intention of the Parties hereto that by the execution of this Agreement, industrial peace shall be brought about and maintained, that the Parties shall co-operate to the end that work may be done efficiently and without interruption. In the case of any violation of this Agreement, the Employer and the Union shall be notified immediately.

B. In the event that a dispute arises between any of the Unions and/or any other Union, over the proper assignment of work by a pipeline contractor, then one of the parties affected by the dispute may refer the matter to the Advisory Council for decision. Pending a decision by the Advisory Council, the work shall continue without slowdown or stoppage in the manner in which it was assigned by the contractor.

C. Where a jurisdictional dispute over proper assignment of work is referred to the Advisory Council, the chairman and the recording secretary shall, as promptly as possible, convene a meeting of one appointed representative of each of the Unions and one appointed representative of the Association which shall be constituted as a Jurisdictional Committee. The Jurisdictional Committee shall select one of its members to act as chairman for the conduct of proceedings with respect to the particular dispute involved. There shall also be a secretary designated who may or may not be a member of the Jurisdictional Committee but only the five principal members of the Jurisdictional Committee shall be entitled to vote.

D. Any of the parties affected by the dispute may submit to the Jurisdictional Committee any evidence desired to substantiate its claim to the work in dispute and the Jurisdictional Committee shall consider all evidence submitted by any of the parties. In arriving at a decision, the Jurisdictional Committee shall be guided, without priority, by the following factors:

1. Decisions of the National Pipeline Industry Joint Policy Committee.
2. Inter-union Jurisdictional Agreements.
3. Skill Requirements
4. Efficiency and Economy.
5. Industry Practice.

A majority decision of the Jurisdictional Committee shall be final and binding of all parties affected by the dispute.

E. Unless otherwise agreed to by the disputing parties and the Advisory

Council, decisions rendered by a Jurisdictional Committee shall be for the particular job on which the dispute arose.

F. Parties in dispute shall have the right to hearing before the Jurisdictional Committee only upon the terms and conditions set out herein. A decision shall be reached as promptly as possible, and not longer than fourteen (14) days after a dispute has been referred to it, unless a longer period has been agreed upon by the interested parties and the Jurisdictional Committee.

G. Each of the respective organizations shall bear the cost of expenses of their representatives on the Jurisdictional Committee and any other parties in attendance at meetings of the Jurisdictional Committee shall bear their own cost of expenses.

The LIUNA's collective agreement does not contain a provision which is similar to this article XIV.

6. The collective agreements between the Association and the IUOE and LIUNA each contain provisions with respect to a grievance and arbitration procedure. As mentioned earlier, the collective agreement between the Association and the IUOE contains article XIV with respect to jurisdictional disputes. The collective agreement between the Association and the LIUNA does not contain an article which specifically concerns itself with jurisdictional disputes. The collective agreements between the Association and the Teamsters and the UA also contain separate articles which specifically refer to jurisdictional disputes and the Canadian Pipeline Advisory Council. The LIUNA have resisted in their collective agreement with the Association the inclusion of an article which specifically concerns itself with jurisdictional disputes. During 1982 a dispute arose in Alberta concerning whether a helper to a fuel truck driver should be a teamster or labourer. On that occasion a local union of the LIUNA submitted itself to a determination of a jurisdictional dispute by a jurisdictional committee. This course of conduct was taken by the western sub-regional office of the LIUNA and the eastern sub-regional office of the LIUNA and the eastern sub-regional office was unaware of the matter before the jurisdictional committee until the matter had been concluded. The proceeding before the jurisdictional committee is presently being challenged in the courts in Alberta. The Ontario Provincial Council of the LIUNA has made it clear to the Association and the three other trade unions that it is not required to be a part of the jurisdictional committee.

7. Section 91(14) states:

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

The subsection creates an exception to the jurisdiction of the Board under section 91 to issue a remedy which it is normally entitled to issue and any provision which purports to exclude the jurisdiction of the Board is strictly construed. See *Canadian Johns-Manville Company Limited* [1974] OLRB Rep. January, 2. In *Adam Clark Company Limited* 76 CLLC ¶16,053, the Board held that where there was a dispute between two trade unions, both collective agreements must establish the dispute-settlement mechanism before the jurisdiction of the Board is excluded under section 91(14).

8. In the instant complaint, while there is a general provision respecting the Canadian Pipeline Advisory Council and a further provision respecting a grievance and arbitration procedure in both collective agreements, only one of the collective agreements contains an article which clearly and unequivocally refers to jurisdictional disputes. That article is detailed in its content and specifically refers to jurisdictional disputes. In the view of the Board, the provisions of both article XVI's are general in nature and neither contemplate nor contain a provision of the type referred to in section 91(14). If article XVI contained such a provision there would be no need for article XIV in the collective agreement between the Association and the IUOE. The fact that the LIUNA in western Canada has apparently submitted to a determination of a jurisdictional dispute by a jurisdictional committee does not, in the opinion of the Board, establish the existence of a provision in the two relevant collective agreements of the type envisaged in section 91(14). In the context of the actual contents of the two relevant collective agreements, the declared position of the LIUNA and the evidence before it, the Board is of the view that the jurisdictional committee which was convened in western Canada was merely in the nature of an *ad hoc* committee and was not established pursuant to a provision as envisaged in section 91(14). In the result, the Board has jurisdiction to entertain this complaint.

9. The parties at the hearing agreed that there was no need for a pre-hearing conference. In their view there will not be extensive evidence in this complaint. In these circumstances, this matter is to be listed for hearing on the merits. The present panel is not seized with any continuation of this complaint.

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**2581-81-JD** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, Applicant, v. **Ontario Hydro** and The International Association of Bridge, Structural and Ornamental Iron Workers, Local 736, Respondents.

**Jurisdictional Dispute – Practice and Procedure – Collective agreements requiring referral to IJDB – Not sufficient evidence that IJDB not functioning – Board lacking jurisdiction**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

**APPEARANCES:** *Chris G. Paliare, Jon McManus, Joe Duchesnay and Stan Petronski for the applicant; J. Baker and P. A. Gauthier for Ontario Hydro; David McKee, James Phair and Michael Zimmerman for Iron Workers Local 736.*

**DECISION OF THE BOARD;** July 5, 1982

1. This is a request under section 91 of the *Labour Relations Act* that the Board issue a direction with respect to the assignment of the work hereinafter set out.

2. A pre-hearing conference with respect to the dispute was scheduled for March 29th, 1982 pursuant to the Board's Practice Note No. 15. During the discussion of preliminary matters, a question arose as to whether subsection 14 of section 91 of the *Labour Relations Act* was a bar to the Board inquiring into the complaint. The Board as constituted herein heard the representations of the parties on this issue and adjourned the hearing pending determination of the issue. On April 15th, 1982 the Board advised the parties by telegram as follows:

"For reasons which will be issued in writing at a later date the Board finds that subsection 14 of section 91 of the *Labour Relations Act* has application to this complaint.

Pursuant to that subsection the Board lacks jurisdiction to deal with the complaint. Accordingly these proceedings are terminated...."

The reasons for that decision are set out herein.

3. Ontario Hydro ("Hydro") the respondent employer to this complaint, is bound together with the complainant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 ("the Boilermakers") to a collective agreement between the Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council ("the Council"). Hydro and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 ("the Ironworkers") are bound to a collective agreement between the Electrical Power Systems Construction Association and the International Association of Bridge, Structural and Ornamental Iron Workers. The Council agreement is effective from May 1, 1974 until April 30, 1984. The Iron Workers' agreement is for a term of May 1, 1978 until April 30, 1980 and provides for its automatic renewal for successive 12 months periods if neither party gives due notice to cancel, revise or modify any provision or provisions. The work alleged to be in dispute is the installation of boiler systems for Hydro's Bruce Generating Station "B". The four boilers concerned were to be installed as complete packages and the work of installing them was assigned to the Iron Workers. The boilers for

the first unit were installed pursuant to that assignment. Problems with the supply of the boilers for the second unit developed which led to them being delivered in a "knocked-down" condition. This caused Hydro to attempt to re-assign the work to the Boilermakers, pursuant to an assignment to them for similar work during the construction of Bruce Generating Station "A". The Iron Workers would not agree to the proposed change and, as a result, the Boilermakers filed this complaint.

4. The two collective agreements contain almost identical language requiring the reference of work assignment disputes to the Impartial Jurisdictional Disputes Board for the Construction Industry of the Building Trades Department, AFL — CIO ("the I.J.D.B.") for resolution and stipulate that the decision of that Board will be final and binding on the parties to the agreements. The parties are agreed that the I.J.D.B. was functioning fully in 1974 when they signed collective agreements containing this undertaking and, except for a brief period in 1978, was making job decisions with respect to work assignment disputes until May 1981.

5. The facts set out hereunder as to the history of this work assignment are not disputed by the parties. The general president of the Iron Workers filed a complaint by letter dated November 9th, 1981 with the chairman of the I.J.D.B. Mr. Dale Witcraft, that Hydro had altered the work assignment with respect to boiler systems on Generating Station "B" and in so doing was in violation of the Procedural Rules and Regulations of the I.J.D.B.. Witcraft referred a copy of that complaint to Hydro and in an accompanying letter commented in material part as follows:

"If the information contained therein is accurate, such action constitutes a violation of the Procedural Rules of the Impartial Jurisdictional Disputes Board. Contractor responsible for the work is directed to proceed immediately with the disputed work in accordance with the original assignment.

It is a violation of the Procedural Rules for a contractor who has made a specific assignment of work to change such assignment unless there is agreement between the trades involved or a directive from the Board.

Please furnish by return communication complete facts and circumstances regarding the initial assignment of the disputed work."

6. Hydro filed a reply by letter dated December 1st, 1981 which described in substantial detail the history and reasons for the work assignment, beginning with the work assignment for the installation of the boiler systems on Generating Station "A" through to the disputed re-assignment of the work on Station "B". The reply also details the steps taken in attempting to have the international representatives of the Boilermakers and Iron Workers resolve the dispute. Hydro concluded its reply by taking the position that the attempted assignment to the Boilermakers of the installation of the "knocked down" boilers was not a change of assignment but was a continuation of the original assignment to the Boilermakers of the same kind of work on Station "A", an assignment which Hydro claims accords with a long-standing agreement on work jurisdiction between the Boilermakers and Iron Workers international unions.

7. Witcraft referred Hydro's reply to the presidents of both international unions on December 8th, 1981. The Iron Workers' response was received by Witcraft on January 19th,

1982 and claimed that the assignment made with respect to Station "B" must be maintained. Witcraft addressed a letter dated January 22nd, 1982 to Hydro and the presidents of the two international unions in which, after reiterating the history of the dispute, he stated the following conclusions:

Accordingly, Ontario Hydro did assign the eight 160-ton boilers to the iron workers and the iron workers did not agree to a change of assignment on those to be delivered in two sections. *It is determined that the original assignment of all eight boilers is to the iron workers.*

*Contractor is directed to perform the work in accordance with the original assignment to the iron workers.*

(emphasis added)

8. Hydro appears to have been prompted by that letter to write to Witcraft on February 5th, 1982 referring to this work assignment dispute and two others on its various construction projects which the various international unions involved had been unable to settle. Hydro expressed the view that these three disputes "... should be appropriately referred to the Impartial Board". Hydro also noted the fact that Witcraft had advised it earlier that "... effective May 31, 1981, the Impartial Jurisdictional Disputes Board is not presently making or issuing job decisions". Hydro's letter ends with the request that "... the Impartial Board inform us if it is prepared to hear the above-noted disputes and render a final and binding decision. If the Impartial Board is unable to do so, we would ask that you respond to that effect with regards to the aforementioned disputes. ...".

9. Witcraft replied by letter dated February 17th, 1982 and his reply states in material part as follows:

"Although the Impartial Board, under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, is not currently issuing job decisions, the Plan is in full force and effect.

During this period, the Plan provides that all trades are to perform work without interruption or threat of interruption to the progress of the project in accordance with the responsible contractor's original assignment. Such assignment is to continue unless the involved International Unions reach agreement between or among them to authorize the responsible contractor to change his assignment. Violations of the Plan and its Procedural Rules and Regulations are handled through the office of the Impartial Jurisdictional Disputes Board or by the Joint Administrative Committee, as may be appropriate under the Plan.

Accordingly, the operation of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry continues to protect the interests of the owner, contractors and unions and to promote the direct settlement of jurisdictional disputes."

10. It is neither contended nor is there any evidence before this Board that the



Boilermakers have written to the I.J.D.B. about the matters raised in the above-noted exchange of correspondence or filed a complaint with it about the work assignment dispute.

11. Counsel for the Boilermakers contends that the parties have agreed to submit disputes to the I.J.D.B. for resolution, therefore it is that Board which must deal with those disputes and not its chairman or the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. The chairman alone is not the Board and it is the chairman alone who has been involved with the instant dispute, therefore the I.J.D.B. has not dealt with it. Furthermore, counsel argues that the I.J.D.B. has not functioned since May 1981 when it ceased making job decisions. Since it is that tribunal to which the parties have agreed to submit their disputes and be bound by its decisions, and since it has ceased to function, there is no tribunal and no binding decisions issuing. Therefore the collective agreement provisions have become null and void. In the alternative, if the Board rejects the view that the I.J.D.B. is not functioning, counsel argues that it should find Witcraft's handling of the dispute not to constitute a decision because he has failed or refused to answer the question put to him by Hydro and his letter of February 17th makes it clear that the I.J.D.B. is not going to deal with the issue. According to counsel, in those circumstances and by operation of the contractual doctrines of frustration and rescission, the collective agreement provisions for the referral of disputes for settlement by the I.J.D.B. are rendered nugatory. For all of those reasons, section 91(14) of the Act does not apply to this case. Finally, section 91(14) notwithstanding, counsel asserts that the Board has "residual jurisdiction" pursuant to section 91(1) of the Act and it should exercise that jurisdiction in the circumstances of this case where there has been a fundamental change in the work on Station "B" which was assigned to the Iron Workers in 1978 and where the chairman of a tribunal outside of the jurisdiction of the Province of Ontario is merely "rubber stamping" the original assignment. Counsel is relying on the Board's decision in *Ontario Hydro*, [1979] OLRB Rep. Feb. 124 in which the Board stated that "The Board has residual jurisdiction under section [91]. In the event that IJDB is unable or unwilling to entertain this dispute. . . , section [91(14)] may not apply to this complaint.". In that case the dispute had not been referred to the I.J.D.B. and it is clear that the Board, having no evidence before it that the I.J.D.B. was unable or unwilling to entertain the dispute, concluded that it may have jurisdiction to entertain the dispute and so deferred entering into an inquiry. On that point, the case at hand is readily distinguishable on its facts.

12. Counsel for the Iron Workers argues that subsection 14 permits parties to collective agreements to contract out of section 91 of the Act by agreeing to refer work assignment disputes to another tribunal and that the parties hereto have committed themselves to such a provision in their respective collective agreements. Those provisions constitute a contracting out of section 91. Counsel rejects the argument of Boilermaker's counsel that the I.J.D.B. has ceased to function even though it has not made job decisions since May 1981. While it is not prepared to make such decisions, counsel asserts that the I.J.D.B. is still functioning and the limits of its function are set out in Witcraft's letter of January 22nd, particularly when it is read in the context of Hydro's February 5th letter and Witcraft's February 17th reply to it. Counsel argues further that the determination expressed in Witcraft's January 22nd letter "... that the original assignment of all eight boilers is to the iron workers." and the direction that the contractor "... perform the work in accordance with original assignment to the Iron Workers." is a decision taken in accordance with the Procedural Rules and Regulations under which the I.J.D.B. operates. Therefore that decision is binding on the parties and attests to the fact that the I.J.D.B. is still operating. Moreover, counsel argues, the quality of the alternative arrangement to which the parties have agreed is not a matter into which this Board should

inquire. In this respect, counsel relied on the Board's statement in its *Ontario Hydro* decision, *supra*, that:

"In our view, where the parties have mutually selected a tribunal as contemplated in section [91(14)], they bear the responsibility of insuring that they entrusted their disputes to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties. . . . Once a tribunal has been established and mutually selected by the parties who have voluntarily agreed to refer their disputes to it, those parties ought to be required to first have recourse to that tribunal."

For all of these reasons, counsel for the Iron Workers contends that the pre-conditions for the operation of section 91(14) exist in the respective collective agreements to which the parties are bound and therefore, by operation of sub-section 14, the Board is precluded from inquiring into this complaint.

13. While counsel for Hydro also takes the position that section 91(14) excludes the Board from the jurisdiction to inquire into this complaint, counsel is not adverse to having the Board entertain it. It is quite apparent from Hydro's representations that they would like to have the complaint conclusively resolved by one tribunal or the other.

14. Section 91(14) of the Act provides as follows:

"The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal."

Where all parties to a dispute have agreed to refer work assignment disputes to a common settlement process, the Board has found consistently, pursuant to subsection 14, that it does not have jurisdiction to inquire into such disputes. See for example, *Spruce Falls Power and Paper Company Limited*, [1972] OLRB Rep. Sept. 836. Recently, however, problems have arisen where the settlement process adopted by the parties has been to refer work assignment disputes to the I.J.D.B.. See for example the Board's decision in *Ontario Hydro*, [1982] OLRB Rep. Feb. 248. At paragraph 13 of its decision the Board notes that the legislature "... doubtless had in mind the IJDB and its predecessors." when it enacted section 91(14) and then the Board goes on to review the historical operation of the IJDB and contrast the relative merits of that process with the jurisdictional dispute settlement process of this Board. In that case the fact situation relative to the way in which the I.J.D.B. was currently functioning, or failing to function if one were to adopt the position of the complainant in that case as well as in the instant one, is quite similar to the factual situation herein. The complainants in the first case were the Labourers' International Union of North America and its Local 1059 and the respondent trade unions were the United Association of Journeymen and Apprentices of the

Plumbing and Pipefitting Industry of the United States and Canada and its Local 527. The Board found that these parties were bound to the procedures of the I.J.D.B. and that these procedures were still operative, therefore the Board lacked jurisdiction to deal with that complaint. In *Dominion Bridge Company Ltd.* [1981] OLRB Rep. Sept. 1222 in which the complainant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, the respondent Boilermakers, Local 128 and the employer were bound through their respective collective agreements to refer work assignment disputes to the I.J.D.B., the United Association argued that it should not be required to submit the dispute to the I.J.D.B. because of its understanding that the I.J.D.B. had ceased to operate, although the United Association conceded that it had no concrete evidence to support its assertion. The Board was not persuaded by that argument and postponed its inquiry into the complaint pursuant to the provisions of section 91(13) of the Act in order to allow the matter to be referred to the I.J.D.B. In doing so, the Board commented as follows at paragraph 8,

“8. We are well aware of the fact that the IJDB has had a somewhat checkered history in recent years. However, we have no evidence before us which would establish that the body has actually ceased to operate. In that the parties to this dispute voluntarily agreed in their collective agreements to refer any jurisdictional disputes to the IJDB, in our view, they ought to be required to at least try to have this dispute dealt with by that body. In the event that the IJDB is no longer operational, or if it fails to render a timely decision, then section [91(14)] might not apply in which case the Board would have jurisdiction to entertain this complaint. . . .”

15. The issue herein before the Board is the relatively straight forward one of whether the collective agreements which are binding upon the three parties contain, in the words of subsection 14, “. . . a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, . . .”. There can be no doubt whatsoever that each of the two agreements contains such a provision in clear, unequivocal terms.

16. If parties whose collective agreements contain a provision to refer work assignment disputes to the I.J.D.B., a tribunal mutually selected by the parties, are not satisfied with the tribunal or with the way in which the procedure is operating, they can by mutual consent amend that provision of the collective agreement at any time. If, on the other hand, they intend to attack the adequacy of the I.J.D.B., they must bring evidence which demonstrates adequately what the I.J.D.B. is doing or failing to do which makes it inoperative.

17. In the case at hand, while the parties agree that the I.J.D.B. has not made job decisions since May 1981, there is no evidence that it has ceased to deal with work assignment disputes. To the contrary, there is ample evidence in Witcraft's letters that the I.J.D.B. is indeed functioning and dealing with work assignment disputes within its Procedural Rules and Regulations. The parties may not like the way it is functioning, but that is not grounds for this Board to find that their collective agreements do not contain “. . . a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, . . .”.



18. We are satisfied that the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, the International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 and Ontario Hydro are bound to the procedures of the I.J.D.B. and that these procedures are still operative. Consequently this Board lacks jurisdiction to deal with this complaint. It was for these reasons that the Board issued its April 15th telegram decision that it lacked jurisdiction to inquire into the dispute and terminated the proceedings.

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**0566-82-U** Mechanical Contractors Association Ontario: Mechanical Contractors Association — Zone 1, Applicants, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628; G. Merservier, Kamtar Construction Limited; and **Quinard Limited**, Respondents.

Construction Industry – Strike – Unfair Labour Practice – Province-wide strike in progress – Employer subcontracting work to contractor not bound by provincial agreement – Union entering into agreement with contractor to supply men – Whether construction or maintenance work – Whether agreement in breach of section 146(2)

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

***APPEARANCES:** R. A. Werry for the applicants; Alexander J. Ahee, George Meservier and Barney Anderson for United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, and George Merservier; R. J. McComb and D. Magne for Kamtar Construction Limited; R. J. McComb and R. Morissette for Quinard Limited.*

**DECISION OF THE BOARD;** July 20, 1982

1. This is an application for relief under sections 135 and 89 of the *Labour Relations Act*. On the evidence, we are satisfied that no claim for relief under section 135 has been made out.
2. The Mechanical Contractors Association Ontario (the "MCAO") is a designated employer bargaining agency representing employers in the industrial, commercial and institutional sector (the "ICI sector") of the construction industry whose employees are represented by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the "U.A.") and its locals, including Local 628 which is based in Thunder Bay. The corresponding designated employee bargaining agency is comprised of the U.A. and the U.A.'s Ontario Pipe Trades Council. Local 628 is an affiliated bargaining agent of the designated employee bargaining agency.
3. The most recent provincial agreement between the designated employer and employee bargaining agencies expired on April 30, 1982. On or about May 25, 1982 the designated employee bargaining agency called a lawful strike. Pursuant to the provisions of

section 148(1) of the Act Local 628 was required to call a strike of all of the employees it represented in the ICI sector. Further, pursuant to section 146 it was unlawful for any employer to enter into a separate arrangement with Local 628 with respect to employees in the ICI sector of the construction industry. Section 146(1) and (2) provide as follows:

“146(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.”

4. Kamtar Construction Limited (“Kamtar”) is a mechanical contractor which frequently employs members of U.A. Local 628. In the ICI sector of the construction industry Kamtar is represented in bargaining by the MCAO. Prior to the commencement of the strike Kamtar employed approximately 30 members of Local 628 on a job at the Abitibi-Price mill in Thunder Bay. The work involved the replacement of large pieces of existing equipment as well as associated piping work. The terms of the most recent provincial agreement between the MCAO and the designated employee bargaining agency were applied to the members of Local 628 who were performing the work.

5. On or about May 25, 1982 all of the members of Local 628 employed by Kamtar at the Abitibi-Price mill went on strike. On or about June 15, 1982 many of these same employees returned to continue the work, but this time in the employ of Quinard Limited (“Quinard”). Quinard was not bound by the terms of the most recent U.A. provincial agreement, but was signatory to a “maintenance agreement” with Local 628. The evidence establishes that Kamtar sublet the work to Quinard and that Quinard entered into an arrangement with Local 628 whereby the Local was to supply Quinard with the tradesmen to work on the project.

6. Having regard to the provisions of section 146(2) of the Act, we are satisfied that the maintenance agreement between Quinard and Local 628 cannot be a valid agreement insofar as ICI construction work is concerned. We are further satisfied that the arrangement by which Local 628 was to supply tradesmen to Quinard, and Quinard was to employ such tradesmen, would amount to the type of arrangement prohibited by section 146(2) if the work at the Abitibi-Price mill is ICI construction work. The respondents in this matter, however, contend that the work in issue is not construction work, but rather non-construction maintenance work. If they are correct, then section 146(2) would not be of any application.

7. Section 1(1)(f) of the Act defines that construction industry as follows:

“‘construction industry’ means the businesses that are engaged in

constructing, altering decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof."

Ever since the introduction of this definition into the Act in 1962, the Board has interpreted section 1(1)(f) so as not to include maintenance work within its scope. See, for example, the *Tops Marina Hotel* case 64 CLLC ¶16,004. A real difficulty arises, however, from the fact that frequently the line of demarcation between "maintenance" and "construction" is not an easy one to discern.

8. In the instant case the work in issue was and still is being performed by approximately 30 members of Local 628. The total value of the work (not including the equipment which is being supplied by Abitibi-Price) is about two million dollars. The work was let to Kamtar as a fixed sum contract. The work was described by Mr. D. Magne, the Thunder Bay area manager of Kamtar, as involving the replacement of rundown equipment, including cleaners, pumps and screens. Prior to the strike, alterations were done to the mill to allow a new screening machine to go in beside the machine it was to replace so that the production process need not be shut down. Additional piping had to be attached to the new screening machine. Counsel for the MCAO contended that the new equipment is being put in to increase capacity. However, this contention was not supported by any direct evidence. Instead the evidence is to the effect that the new equipment is not being installed to increase the mill's capacity, but only to replace worn out equipment.

9. It is the contention of the respondents that the purpose of the work in question is to preserve the functioning of an existing system and hence according to the reasoning of the Board in *Master Insulators Association of Ontario Inc.* [1980] OLRB Rep Oct. 1477, the work should be regarded as maintenance work. We are unable to accept this contention. To the extent that work is done on existing equipment and piping to keep it functioning properly, we agree that it can properly be classified as maintenance work. However, in the instant case, large pieces of existing equipment are being taken out of the production process and replaced by new equipment. Piping has to be attached to all of the new equipment and a certain amount of additional piping installed. In our view, the removal of large pieces of equipment forming part of the existing production system, and the installation of new equipment along with the related piping work, goes beyond simple maintenance work and constitutes work which comes within the construction industry. We are further satisfied that it is work within the ICI sector.

10. Having regard to the above, the Board finds that the "maintenance agreement" between Quinard and Local 628 is not a valid agreement insofar as the work at the Abitibi-Price mill in Thunder Bay is concerned. Further, any arrangement between Quinard and Local 628 to apply the terms of the maintenance agreement to this project is an arrangement contrary to the terms of section 146(2) of the Act. The Board accordingly directs Quinard and U.A. Local 628 to cease applying the terms of this agreement to the Abitibi-Price project. The Board also finds that the arrangement between Local 628 to supply, and Quinard to employ U.A. tradesmen amounted to an arrangement contrary to section 146(2). Accordingly, U.A. Local 628 is directed to cease supplying and Quinard Limited to cease employing members of U.A. Local 628.

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**0359-82-M** Drywall, Acoustic, Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Readywall Ltd.**, Respondent.

**Construction Industry Grievance – Practice and Procedure – Witness – Material witness evading service of sub-poena – Board not having power to direct substitutional service or issue warrant with penalty attached**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members W.G. Donnelly and H. Simon.

**APPEARANCES:** *M. Zigler and H.K. Weller for the applicant; no one appeared for the respondent.*

**DECISION OF THE BOARD;** July 9, 1982

1. This is an application under section 124 of the *Labour Relations Act*. The applicant union contends that the respondent company has failed to comply with certain collective agreements by which it is bound. In particular, the union alleges that the company has failed to remit certain payments in respect of welfare, pension, supplementary unemployment insurance benefit, vacation pay, statutory holiday pay, and “industry” funds. These payments are calculated with reference to the number of hours worked by the company’s employees.

2. When this matter came on for a hearing on June 2, 1982, counsel for the union advised the Board that he had attempted to subpoena Stefan Dulk, a principal of the respondent company, to give evidence and produce documents which were necessary for the union’s case. Without Mr. Dulk’s testimony and the company’s employment records, the applicant indicated that it might have some difficulty establishing the precise quantum of damages flowing from the company’s breach of the collective agreement. There is no doubt that this evidence is relevant, material, and perhaps necessary for the applicant to fully substantiate its claim. However, counsel contended that Mr. Dulk was evading service of the subpoena, and requested the Board to make an Order for substitutional service, or otherwise fashion a Direction which would facilitate a resolution of the matters in dispute. Counsel pointed out that the purpose of section 124 was to provide speedy relief (the Board must hold a hearing within 14 days), and argued that it would subvert the entire process if the principal of a respondent employer, by evading service, could prevent necessary evidence coming before the Board. The Board heard the viva voce evidence of Leonard Rubenstein, a process server retained by the applicant, and we have no doubt that Mr. Dulk is in fact evading service.

3. The power of the Board to require the attendance of witnesses has recently been reviewed in *Casalbil Contracting Ltd.* [1980] OLRB Rep. Sept. 1278, where the Board observed:

“3. In proceedings under section 112a, the Board, by virtue of sections 92(2)(a), 112a(3) and 37(7) of *The Labour Relations Act*, has the power “. . . to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath . . . in the same manner as a court of record in civil cases.” The Board is acting as an arbitrator when

dealing with matters under section 112a of the Act. The enforcement mechanisms contained in sections 12 and 13 of *The Statutory Powers Procedure Act* are unavailable to the Board in these proceedings because *The Statutory Powers Procedure Act* does not apply to arbitrators under *The Labour Relations Act*. (See section 3(2)(d) of *The Statutory Powers Procedure Act*, and *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95*, (1979), 25 O.R. (2d)8.) Thus, the enforcement of the Board's process is left entirely to the Board acting under the authority conferred upon it by *The Labour Relations Act*.

4. The Court is *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, supra*, stated at page 13:

"the purpose of the proceedings under s. 112a was to provide a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. It is unnecessary for us to answer us as to the appropriate procedures to be followed by the Board under s. 112a with respect to the issue of summonses or subpoenas and the enforcement thereof, but we are satisfied that the Act itself provides a method of enforcing the attendance of witnesses and the production of documents that could be applied with much greater speed in the case of a witness like Bittenbinder than is involved in an application by way of stated case to this Court under s. 13 of *the Statutory Powers Procedures Act, 1971*."

The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3d) 114-336, paragraph 673; Rule 275, Supreme Court of Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant, is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board, may therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board

if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.”

But, in *Casalbil*, the Board was dealing with an individual who had been personally served, but who had failed to appear as required by the subpoena. So far, as we are aware, the Board has never previously had to address the question posed by the applicant in this case: whether substitutional service of a subpoena can be ordered, or whether there is some other mechanism by which a witness can be compelled to attend before the Board, on pain of punishment, which does not, in itself, involve personal service upon the recalcitrant individual.

4. A subpoena, does not fit easily within the meaning of the words “notice or communication” found in section 113(1) of the Act dealing with mailed notices, nor do the Board’s rules respecting service of documents by mail (Rules 74-78) apply to subpoenas. This is not surprising, of course, for section 12 of the *Statutory Powers Procedure Act* clearly requires personal service of a subpoena, and until the court held otherwise in *Re International Association of Heat etc. Workers et al. supra*, it was thought that the S.P.P.A. applied to all proceedings under section 124 (formerly section 112a), we do not think that the Court was suggesting that subpoenas need not be personally served, or that there was another more convenient but equally enforceable vehicle which does not require personal service. Indeed, upon a perusal of the Rules of Practice of the Supreme Court of Ontario, it is by no means clear that even that tribunal can order substitutional service of a subpoena.

5. We have carefully considered the applicant’s submissions and are not unaware of the dilemma which it faces. However, we do not think that we are empowered to issue substitutional service of a subpoena or to issue a Direction to appear in the nature of a “bench-warrant” which carries with it penal consequences but does not itself have to be served personally. In our view, the situation here is distinguishable from that before the Board in *Casalbil, supra*, or considered by the Court in *International Assoc. of Heat etc. Workers et al. supra*. Where, as here, the applicant is faced with a situation in which a necessary witness is evading service, it appears to us that the applicant has two options available to it:

- (a) it can seek an adjournment in order to effect service on Mr. Dulk or some officer or director of the respondent who has access, or the right of access to the required documents or information, and may be punished if such material is not produced; or
- (b) it can proceed to the hearing on the merits, tendering such evidence (which in the circumstances will be uncontradicted) as is available to prove its case, and establish the damages flowing from such contractual breach.

Of course, if the applicant adopts the second alternative, the Board will have to make a decision on the basis of the evidence before it. If a breach is established, the Board will have to determine the sum which the respondent will be required to pay to the union as agent for the respondent’s employees, and will also have to consider such other relief by way of affirmative direction or otherwise as may be requisite to effect of binding resolution of the parties’ dispute. (See: *Re Samuel Cooper & Co. Ltd. et al* [1973] 2 O.R. 841, 35 DLR (3d) 501). Such orders, if given, would be enforceable against the respondent in the Supreme Court of Ontario in the



same manner as a judgment or Order of that Court. (See section 44(11) of the Act). And having notice of the hearing but declining to participate as well as evading service of a subpoena which would have resulted in a more complete evidentiary picture, Mr. Dulk will hardly be in a position to complain of such result.

6. For the foregoing reasons, the Board directs the Registrar to relist this matter for a hearing, and to serve the parties in accordance with the Board's own Rules of Practice with both the usual notice of hearing and a copy of this decision.

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**1972-81-R United Steelworkers of America, Applicant, v. Rheem Canada Inc., Respondent. v. Group of Employees, Objectors.**

**Bargaining Unit – Practice and Procedure – Union withdrawing objection to employee inclusions after count released at examiner hearing – Not attempt to gerrymander employee list – Board distinguishing *Santa Maria Foods* and permitting withdrawal.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and B. Armstrong.

**APPEARANCES:** *Jacob deKlerk for the applicant; Donald F. O. Hersey and Gerry Norman for the respondent; no one appearing for the objectors.*

**DECISION OF THE BOARD; July 29, 1982**

1. This is an application for certification.

2. On February 10, 1982 the Board, on an interim basis, issued a certification to the union pending the resolution of the status of six persons in dispute. An officer of the Board was appointed to conduct an examination into the duties and responsibilities of the persons in dispute. Subsequent to the issuance of the officer's Report, the union withdrew its challenge to the company's position that Ms. Jean McKenzie is employed in a confidential capacity within the meaning of section 1(3)(b) of the *Labour Relations Act* and is not therefore an employee falling within the bargaining unit. The respondent company has not challenged the above modification of the union's position. Having regard to the agreement of the parties we conclude, therefore, that Ms. McKenzie, secretary clerk, is excluded from the bargaining unit.

3. Subsequent to the examination of Ms. Pat Hand who occupies a position that remains in dispute, counsel acting on behalf of the company notified the Board by telegram late in the afternoon of February 17 that it was withdrawing its challenge to the union's position that Ms. S. Toth and Ms. M. Rodgers are not employees of the respondent unit. The union raised no objection to the employer's modification of its position. Accordingly, having regard to the further agreement of the parties, the Board concludes that Ms. Rodgers and Ms. Toth are not employees of the respondent and do not fall within the bargaining unit.

4. Immediately following the conclusion of the examination of Ms. Pat Hand on

February 17, 1982, the union made a second alteration in its position concerning the employee status of the persons in dispute. It withdrew its challenge to the position that had been taken by the respondent up until that point that Ms. L. Gallo and Ms. S. Mullis fell within the proposed "office, clerical and technical" bargaining unit. This withdrawal was made with the approval of the Board's officer and without objection at that time from the person acting on behalf of the respondent. Subsequently, however, the respondent registered its objection.

5. The Report of the Board officer records the original position taken by the applicant union on the status of S. Mullis and L. Gallo as follows:

The applicant challenged the inclusion of Sandra Mullis and Loral Gallo on the basis of a lack of community of interest with the proposed bargaining unit, and that they should properly fall within the agreed "sales" exclusion.

The union then altered its position to agree with the respondent's position, as it stood at that time, that is, that Ms. Gallo and Ms. Mullis were employees within the bargaining unit.

6. Subsequent to the examination hearing where the union withdrew its challenge to Ms. Gallo and Ms. Mullis, the respondent, by the same telegram of February 17 referred to above altered its original position relating to Ms. Mullis and Ms. Gallo by stating that it now wished to withdraw its dispute to the applicant's request that they be excluded from the unit. As confirmed in correspondence from counsel for the respondent dated February 26, 1982 and March 22, 1982 it then became the position of the respondent that Mullis and Gallo should be excluded from the bargaining unit, the position originally taken by the union.

7. At the hearing before the Board convened to entertain representations from the parties on the officer's Report including the status of Ms. Pat Hand and the situation relating to the alteration of the parties' positions on the status of Ms. Gallo and Ms. Mullis, counsel for the respondent stated that he was not requesting that the Board conduct an examination into the duties and responsibilities of Ms. Gallo and Ms. Mullis. Instead, he asked the Board to conclude that Ms. Mullis and Ms. Gallo were excluded from the bargaining unit on the basis that once the union had asked for them to be excluded, it could not subsequently agree to have them included. Counsel noted that the respondent was not taking a position one way or the other on whether these individuals should be included in the unit but was objecting to the union withdrawing its objection to their inclusion and in fact agreeing to the respondent company's position as it was at that point. Counsel further stated that he was agreeing with the original position taken by union and that these persons should therefore be excluded.

8. The Board heard extensive argument from the parties on whether the union should be permitted during the examinations, and therefore after the release of the membership count, to alter its position on the status of two persons in dispute and agree with the respondent. Citing the Board's decision in *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, respondent counsel expressed his concern that to allow the union's withdrawal would be to condone gerrymandering by the union.

9. The Board has carefully reviewed the sequence of events in this matter. An interim certificate had issued at the time of the union's withdrawal of its challenge to the inclusion of

Mullis and Gallo in the bargaining unit. The statement(s) of desire against the union sponsored by Mullis and Gallo had already been dismissed by the Board. Whether Mullis and Gallo are included in or excluded from in the bargaining unit does not in any way affect the union's representation rights.

10. Having regard to the basis of the original position of the union as set out in the Report of the Board's officer and quoted above, as well as the sequence of events, the Board is satisfied that the union's withdrawal of its challenge to Mullis and Gallo was not an attempt to gerrymander the employee list or the structure of the bargaining unit and does not fall with the mischief described in *Santa Maria Foods, supra*.

11. The Board therefore confirms the position originally taken by its officer to allow the union to withdraw its challenge to the inclusion of Ms. Mullis and Ms. Gallo in the bargaining unit and to agree with the position of the respondent as it stood at that point that these individuals fall within the bargaining unit description. We note that the respondent does not take the position that the actual duties and responsibilities of Mullis and Gallo should cause the Board to conclude that they should be excluded from the bargaining unit.

12. On the basis of the considerations set out above the Board concludes that Ms. Mullis and Ms. Gallo are employees within the bargaining unit.

13. We turn then to determine the status of Ms. Pat Hand who is employed as the payroll and accounts receivable clerk. The Board concludes on the basis of the Report of the Board's officer that Ms. Hand's duties relating to the payroll and the minimal extent of her access to personnel files during the regular course of her duties clearly do not establish that she is employed in a confidential capacity in matters relating to labour relations. (See: *Sheridan College of Applied Arts and Technology*, [1976] OLRB Rep. Dec 844; *Toledo Scale, Division of Reliance Electric Limited*, [1974] OLRB Rep. June 406; *Nashua Canada Ltd.*, [1970] OLRB Rep. Dec 921; *No-Sag Spring Co. Ltd.*, [1966] OLRB Rep. Dec 667; *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept 379) Accordingly, the Board finds that she is an employee and falls within the bargaining unit.

14. The Board finds, therefore, that a bargaining unit appropriate for collective bargaining consists of all office, clerical and technical employees of the respondent in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, salesmen, plant engineer, secretary to the plant manager, secretary-clerk, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.

15. For the purposes of clarity we note that Ms. Pat Hand, payroll and accounts receivable clerk, Ms. S. Mullis and L. Gallo are employees and fall within the bargaining unit. We further note the agreements of the parties that Ms. J. McKenzie, secretary-clerk, is employed in a confidential capacity and excluded from the bargaining unit and that Ms. S. Toth and Ms. Rogers are not employees of the respondent and do not therefore fall within the bargaining unit.

16. A final certificate may now issue.

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**2522-81-JD Stoney Creek Mechanical Limited, Complainant, v. Sheet Metal Workers' International Association Local Union No. 537, The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local Union No. 1007, The Iron Workers District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers Local Union 736, International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Respondents, v. Ontario Sheet Metal & Air Handling Group, Intervener.**

**Evidence – Jurisdictional Dispute – Practice and Procedure – Collective agreements requiring referral to IJDB – Evidence inadequate as to status of IJDB – Board unable to decide whether IJDB functioning – Board allowing parties opportunity to present further evidence – Board not adopting findings of fact by NLRB automatically**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

**DECISION OF THE BOARD;** July 29, 1982

1. Paragraphs 2, 3 and 6 of the Board's decision which issued July 14, 1982, incorrectly referred to the complainant or complainant's counsel when it should have referred to the respondent Sheet Metal Workers' International Association Local Union No. 537 ("the Sheet Metal Workers") or its counsel. Therefore, where the word "complainant" appears in paragraphs 2 and 3 it is replaced by the words "the Sheet Metal Workers" and, where the words "counsel for the complainant" and "complainant's counsel" appear in paragraphs 3 and 6, they are replaced by the words "counsel for the Sheet Metal Workers", so that the text of that decision reads as follows:

1. This is a complaint under section 91 of the *Labour Relations Act* with respect to a work assignment. Three of the respondents have alleged that sub-section 14 of section 91 applies to the complaint and, pursuant to that provision, the Board lacked jurisdiction to inquire into the complaint. Accordingly, a hearing was scheduled to receive the evidence and representations of the parties on this issue.

2. The evidence and representations made to the Board at the hearing included, inter alia, the submissions of counsel for, respectively, Sheet Metal Workers' International Association Local Union No. 537; The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local Union No. 1007; The Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers Local Union 736 and International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers and Helpers. Local 128 that all parties to the dispute were bound by their respective collective agreements to refer work assignment disputes to the Impartial Jurisdictional Disputes Board

for the Construction Industry of the Building Trades Department, AFL-CIO ("the IJDB") for resolution. It is common ground that the applicable collective agreements contain language to that effect. The Metal Workers and the intervener, however, contend that these provisions have been rendered nugatory because the IJDB has ceased to function.

3. Subsequent to the hearing, counsel for the Sheet Metal Workers referred to the Board and asked it to consider as evidence in these matters a document which purports to be a letter from the General Counsel of the National Labour Relations Board ("the NLRB") to Mr. Robert A. Geordine, Chairman, Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes. That letter contains the following statement:

"Recently, the Board issued a decision in *Construction and General Labourers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO (Modern Acoustics, Inc.)*, 260 NLRB No. 112, a copy of which is enclosed, wherein the Board made a determination of the jurisdictional dispute despite an outstanding award by the IJDB. In making its determination of the dispute the Board established that:

... since June 1, 1981, the IJDB has been inoperative, has ceased hearing such disputes, and is not now a viable organization in a position to administer or police either the award of the agreement. In these circumstances, we do not view these dispositions as determinative of the cases now before us. Accordingly, we hold that the disputes are properly before the Board for determination under Section 10(k) of the Act."

The Board goes on to say in footnote 17 of the decision:

"... Accordingly, we would be remiss in our statutory duties if we did not, under the circumstances here, find that the inoperative status of the IJDB made its outstanding awards useless as a means of adjusting the parties' work dispute."

Counsel for the Sheet Metal Workers appears to view the NLRB's comments allegedly extracted from its decision referred to in the quotation as a finding that the IJDB is inoperative. Accordingly counsel is requesting the Board to adopt the reasoning of the NLRB in reviewing the evidence in these matters on the question of whether the IJDB has ceased to function.

4. This same question has been before the Board in a series of complaints under section 91. It is fairly common ground amongst parties who have stipulated to the IJDB procedures in their collective agreements that it has not made job decisions in work assignment dis-

putes since June 1, 1981. Prior to that date even, the complainant in *Ontario Hydro*, [1979] OLRB Rep. Feb. 124, raised doubts as to whether the IJDB was functioning. More recently the allegation that the IJDB had ceased to operate was before the Board in *Dominion Bridge Company Ltd.*, [1981] OLRB Rep. Sept. 1222. The Board noted that, notwithstanding that allegation, the Board had “no evidence before [it] that the [IJDB] has actually ceased to operate.” The Board postponed inquiring into the complaint pursuant to section 91(13) so that the parties could at least try to have the dispute dealt with by the IJDB. It also observed that section 91(14) might not apply if the IJDB is no longer operational. The complaint was ultimately brought back on for hearing and in a decision which issued May 31st, 1982, reported in [1982] OLRB Rep. May 667, the Board found that section 91(14) applied and it did not have jurisdiction to inquire into the complaint. The Board noted that the complaint still had not been referred to the IJDB for a hearing and that the complainant was relying on a telegram from the chairman of the IJDB stating that it was not making job decisions but that parties who were stipulated to its procedures were still bound by the procedural rules of the IJDB with respect to work assignment disputes and that those rules were still in full force and effect. The chairman directed the parties to proceed according to those rules. This Board then expressed the caution to the parties that, if they intended to raise the issue of whether such directions amount to “a decision” for purposes of the provisions in their collective agreements for resolution of work assignment disputes. “... sufficient evidence relating to the structure and operation of the IJDB, as well as the authority of its [chairman] to make decisions on its behalf, will be put before the Board so as to allow for full and proper consideration of the matter.” The Board had the same issue before it again in *Ontario Hydro*, [1982] OLRB Rep. July ... and found that section 91(14) applied and that it lacked jurisdiction to inquire into the complaint. In finding so, the Board commented at paragraph 16 that parties who “... intend to attack the adequacy of the I.J.D.B., ... must bring evidence which demonstrates adequately what the I.J.D.B. is doing or failing to do which makes it inoperative.”

5. There can be little doubt from those decisions that parties coming before the Board and the Board itself are concerned with the status of the IJDB's current functioning. These decisions also allude to the Board's concern about the lack of evidence before it which might assist it in dealing with that issue. In view of these concerns, the Board believes that it would be of assistance to it in determining whether it has jurisdiction to inquire into this complaint, to have the complaint put back on for hearing to receive the further evidence and representations of the parties as to whether the IJDB is functioning and how the resolution of that question should affect the Board's determination of whether it has jurisdiction to inquire into this complaint. This does not mean that the Board is adopting or is prepared to adopt the findings of fact and reasoning of the NLRB in its *Modern Acoustics, Inc.*, decision simply based on the letter filed by counsel for the Sheet Metal Workers without



receiving the same kind of evidence which the NLRB considered. Rather the purpose of this decision is to give the parties the opportunity to bring before this Board what further evidence they can muster which would assist its evaluation of the status of the IJDB as it relates to the Board's jurisdiction under section 91(14) of the Act.

6. The Registrar is directed, therefore, to list this matter for hearing on the earliest available date for the purpose of receiving the further evidence and representations thereon of the parties with respect to whether the Impartial Jurisdictional Disputes Board is operating to resolve work assignment disputes within the meaning of section 91(14) of the Act and what effect, if any, the resolution of that issue should have on the Board's determination of whether it has jurisdiction to inquire into this complaint.

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**0218-82-U Sylvia Colalillo, Complainant, v. United Auto Workers International and Local 525, Respondent**

**Duty of Fair Representation – Unfair Labour Practice – Union denying complainant right to run for office of area steward – Dispute purely internal and not representation matter – Section 68 concerned with representation by union vis-a-vis employer only**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

**APPEARANCES:** *Sylvia Colalillo, Iolanda Filice, Muriel Rice and Harriet Greenaway for the complainant; Steve Nimigon, Dave Pendlebury, Jessie Williams and Shareen McConville for the respondent.*

**DECISION OF THE BOARD; July 13, 1982**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the complainant, Sylvia Colalillo, was denied the right to run for the position of Area Steward, in violation of section 68 of the Act. That section provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The reason the respondent denied the complainant the right to stand for election is that it was the view of the respondent that the complainant, having been laid off for more than 60 days, no longer had any departmental seniority on which to run. the requirement for

departmental seniority arises out of the respondent's election rules, but it is common ground that the determination of that seniority revolves around the interpretation of certain provisions of the collective agreement with the complainant's employer. The respondent's Executive and committee members understood the language of the collective agreement to mean one thing, the complainant another. This is the basic dispute between the parties. The dispute was exacerbated by the indecision of certain of the respondent's officials at the outset, first indicating to the complainant that she was eligible to stand for election, and then that she was not. The respondent's handling of the complainant's appeal, which need not be elaborated upon, also may have done little to allay the complainant's perception that she was the victim of some form of discrimination at the hands of the respondent's officials. On the other hand, it must be noted that, even if this complaint were found to come within the limits of section 68 of the Act, it would not be the function of the Board to decide whether the respondent's or the complainant's interpretation of the collective agreement is the correct one. The Board in a case such as this would rather be looking to determine whether the interpretation placed by the respondent upon the language of the collective agreement was so implausible as to create an inference of arbitrariness or bad faith. In that regard, the Board cannot help but comment that a reading of Articles 30.2 and 33.1 *together* produce a situation which is ambiguous in the extreme, and it is little wonder that the various witnesses put forward to testify have been coloured one way or the other by the specific incidents which they themselves have encountered in the application of these sections in the past. It is also not surprising to the Board, given the ambiguities in the contract language itself, that the practice of different members of management in these various incidents may have been inconsistent as well. The assistance provided to the Board by the evidence of Mr. Davis, the former Personnel Manager of the employer, is also limited, in view of the fact that his account of the history dealt largely with the rights of persons *in* the plant to bid on jobs and that he as Personnel Manager did not purport to have direct knowledge of all of the isolated instances upon which other witnesses might be relying. Mr. Davis's account, in fact, speaks more about the retention of *Divisional* seniority, affecting the right to recall generally, than it does of seniority within a department.

3. The interpretation which the employer might have put on the contract language is, however, not directly relevant here. The dispute was solely between the complainant and her trade union, and this is the primary problem which the complainant is faced with in these proceedings. The real issue between the complainant and the respondent is the complainant's eligibility to run for the Union position of steward, and the employer understandably has taken no position on that matter. The dispute between the complainant and her trade union, in other words, is wholly internal. The duty of fair representation in section 68 on the other hand, is concerned only with the representation by a trade union of an employee vis-a-vis *his or her employer*. See *Ford Motor Company* [1973] OLRB Rep. Oct. 519; *Myrna Wood* [1981] OLRB Rep. Feb. 137; *Frank Manoni* [1981] OLRB Rep. Dec. 1775; *Softley Cartage*, Board File No. 1347-81-U, released May 26, 1982. It is only because the employee's normal rights to deal directly with the employer are circumscribed by collective-bargaining law that the duty of fair representation arises. As the Board stated in *Frank Manoni*, *supra*, at paragraph 11:

... The arbitrary, discriminatory or bad faith conduct, directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees at the *hands of their employer*.

As the Board also noted in *Mario Moreira*, [1980] OLRB Rep. July 1039:

... this Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws.

And also in *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169 the Board stated:

8. ... the duty of fair representation owed by a trade union to an employee under section 60 [now section 68] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v Kuzych* (1951), A.C. 585; *Lee v Showmans Guild* (1952), All. E.R. 1175; *Orchard v Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v Freeman et al* (1958), 26 W.W.R. 546).

4. The only aspect of the present complaint touching upon the employment relationship as such is the fact that the collective agreement does provide a kind of super-seniority for area stewards in the event of lay-off and the complainant points out that had she been permitted to run for election, she might today be still employed in the plant in the place of the incumbent area steward. This, however, is obviously not the basic reason why stewards are provided for, and the complainant does not put this consideration forward as a significant element of motivation either on her part, in seeking the nomination, or, more importantly, of the respondent in denying her that status. The matter of super-seniority was, the complainant concedes, not even raised with the respondent at any time prior to the filing of this complainant. It is, in other words, an issue wholly incidental to the real dispute which arose between the parties, being the matter of eligibility for internal trade union elections, and is not sufficient to clothe the Board with jurisdiction.

5. The complaint accordingly must be dismissed.

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**0673-82-U United Steelworkers of America, Complainant, v. Tech Corporation Limited (Silverfields Division), Respondent.**

**Duty to Bargain in Good Faith – Unfair Labour Practice – Employer withdrawing offer made – Whether withdrawal justified or caused by desire to avoid collective agreement**

**BEFORE:** George W. Adams, Q.C., Chairman, and Board Members M. Eayrs and M. J. Fenwick.

**APPEARANCES:** *Brian Shell and Rhéal Lemoine for the complainant; and Roy C. Fillion, C. Peterson, K. I. Hymas and M. Robinson for the respondent.*

**DECISION OF GEORGE W. ADAMS, Q.C., AND M. EAYRS; July 30, 1982**

1. The complainant alleges that the respondent violated sections 15, 64, 70 and 75 of the *Labour Relations Act* and extensive remedial relief is requested. The case was, however, argued on the basis of a violation of the bargaining duty centering on the allegation that the respondent unlawfully withdrew an offer for the purpose of avoiding a collective bargaining agreement between the parties.

2. The complainant and respondent were parties to a collective agreement effective July 3rd, 1981 to July 2nd, 1982. On April 2nd, 1982 the complainant gave notice to the respondent of its desire to amend and renew the aforementioned collective agreement. On the dates of May 11th, May 20th and June 23rd, 1982 the parties met and engaged in collective bargaining for the purposes of renewing the previous collective agreement. On June 17th, 1982 Mr. Trevor Stevenson was appointed Conciliation Officer and a conciliation meeting was conducted on June 23rd, 1982.

3. There is little or no dispute that at the meeting of May 11th the union simply reviewed its proposals with company officials. The proposals took the following form:

Proposals by the United Steelworkers of America to Tech Corporation Limited, (Silverfields Division), pursuant to the current Collective Agreement between the aforementioned parties that will expire on July 2nd, 1982.

**ARTICLE 2 — RECOGNITION**

2.01 The Company recognizes the Union as the exclusive bargaining agent for all employees of the Company at its mines, mills or surface plants in the Province of Ontario.

**ARTICLE 18 — INSURANCE-WELFARE PROGRAMME**

18.01 (b) Dental Plan to read current schedule of fees.  
 Dental — 100% paid by the Company.  
 Sickness & Accident — 100% paid by Company.  
 \$500.00 L.T.D. with no offsets. (delete any reference to offsets).

### *ARTICLE 19 — WAGES*

- 19.01 Wages to be increased \$1.00 across the board.
- 19.02 E. (ii) Roll-in each three months of the Contract.
- 19.09 *SEVERANCE PAY* — \$15.00 per month.

Severance Pay — given on the day of notice of lay-off or transfer.

### *ARTICLE 20 — SHIFT DIFFERENTIAL*

- 20.01 A shift premium of 30¢ per hour shall be paid to employees who are scheduled to work and who perform their regular work on afternoon shift or night shift.
- 20.02 A shift premium of 40% per hour shall be paid to employees who are scheduled to work and who perform their regular work on graveyard shift.

### *ARTICLE 22 — DURATION OF AGREEMENT*

- 22.01 One year Agreement.

Foreman to cease doing work normally performed by Bargaining Unit employees.

Safety Apparel to be paid on every receipt up to \$125.00 to all employees (letter dated October 1, 1981 — Subject: Safety-Clothing Allowance). (attached).

4. Attending this first meeting were Michel Robinson, Manager; Doug McClelland, Accountant; and John Young, Mine Superintendent for the company. For the union, Mr. Rhéal Lemoine, Staff Representative; Roland Boifvert; Danny Larabie; and Elwood Sweet. Mr. Robinson was the company spokesman and this was his first set of negotiations. Mr. Lemoine was appointed Staff Representative of the complainant trade union May 1st, 1982 and he too has had very little experience in conducting negotiations. To complicate matters, Mr. Robinson's first language is French and he has some difficulty understanding and expressing himself in English.

5. A second meeting was held May 20th and at this meeting the company spokesman was Mr. K. I. Hymas, General Manager, Eastern Operations for the respondent corporation. He has been with the company nine years and has had considerable labour negotiations experience. There is no dispute that Mr. Hymas gave a rather depressing review of the company's position to the trade union. The bargaining unit numbers 60 employees who are engaged in silver mining and milling. Mr. Hymas pointed out that the price of silver had been decreasing for the last two years and that it was currently at an all time low. He pointed out that there was a decreasing grade of ore at the mine and that the company had not made an overall operating profit for about six months. He went on to describe the company's profit experience month by month over the previous year. He said that he hoped the mine could be kept open until Christmas, although at the time of the hearing Mr. Hymas indicated that the termination or closing of the mine would likely occur at the end of October. There is also no dispute that Mr. Hymas reviewed all of the trade union proposals and was generally negative with respect to all of them except for the last proposal dealing with the renewal of the collective

agreement. Where the complainant and respondent part company is over what Mr. Hymas is alleged to have said about the continuation of the COLA clause.

6. It was Mr. Hymas' evidence that he emphasized the company was not looking for "a cut" in wages but that "what was valid in the agreement on July 2nd (the last day of the agreement) the company would adopt and propose for a one year extension without further change". He explained to the Board that the July COLA payment had not yet been paid at the time of the meeting and that it was expected to generate 10¢. He said that what he meant by referring to "what was valid on July 2nd would remain valid until July 1983" is that the company was willing to continue to pay the expected 10¢ COLA payment "unrolled in" for the life of the contract. He said there was nothing said by the trade union that gave any indication that they did not understand what he was saying to them. Mr. Lemoine, on the other hand, said that he recalled Mr. Hymas indicating that the company was willing to accept a one year contract and when asked if such a contract included COLA Mr. Hymas indicated that it would. Mr. Hymas, however, specifically denies stating that COLA would continue to be paid. In any event, there was clearly no discussion of the necessary revisions to the various dates the reference to a COLA clause in Mr. Lemoine's notes is contained in a different colour ink which gives us some cause for concern. There is also no dispute that Mr. Hymas told the committee that if there was a strike the company would simply close its doors. Nor is it contested that following this meeting it was the union that applied for conciliation with the company preferring to continue pre-conciliation discussions.

7. The next meeting between the parties was June 23rd, 1982 and this meeting was with the Conciliation Officer, Trevor Stevenson. The parties met face to face first thing in the morning and then Mr. Stevenson worked with each of the parties in private session. Finally, some time in the afternoon, he called the parties together and another face to face session was held during which he reviewed their respective positions. It would appear he indicated that the company was willing to increase the severance pay from the present \$10.00 per month per year of service to \$15.00 and that it was unwilling to make any reference to the *Employment Standards Act*. He stated that the company was willing to continue the present agreement for one year and then either asked whether or asserted that the company's offer included the continuation of COLA payments. Unfortunately, at this meeting only Messrs. Robinson, McClelland and Young were present for the company because Mr. Hymas had a commitment elsewhere. Mr. Robinson testified that after a discussion with Mr. Young and Mr. McClelland at the outset of the morning of June 23rd before meeting with the union he became unsure whether the company's position was the continuation of COLA payments or not. He had thought Mr. Hymas had said on May 20th that the COLA clause would continue although he did recall specific mention by Mr. Hymas of the July 2nd date. On the other hand, according to Robinson, McClelland and Young thought that Mr. Hymas did not intend to include COLA. Mr. Robinson testified that he was unable to get in contact with Mr. Hymas prior to meeting with the union and was confused over what was happening and too embarrassed to admit this confusion to the trade union. When he did talk to Hymas at 1:00 p.m. he forgot to raise the issue with him. Thus, he testified, when Mr. Stevenson made reference to the continuation of the COLA at the afternoon meeting he said nothing and instead Mr. Lemoine confirmed that the company intended the COLA payment to continue. Lemoine's recollection is that Stevenson asked Robinson whether the COLA payment was to continue and Robinson said that this was the case. But regardless of who said what, the union committee did not accept the company's proposal. Rather they agreed to submit it to the membership for a ratification vote and to take a neutral position. The company was advised that the ratification vote would take place on the following Monday and it was Lemoine's



evidence that he and other committee members told the company that they thought the offer would be accepted because the employees wanted the continuation of the COLA payment. Robinson denies that this was said to him and his colleagues but agrees that he had the impression that the continuation of COLA was important to the trade union.

8. Both Robinson and Hymas testified that Hymas called Robinson at 6:00 p.m. that evening to review what had happened at the meeting. Hymas had expected the meeting to be an introduction to the conciliation officer and a review of positions. He certainly did not intend that an agreement be concluded on that day and even Robinson seemed to be surprised at the way the meeting progressed. Hymas testified that, in questioning Robinson about the day, it became apparent that Robinson had misunderstood the company's position as expressed by Hymas at the meeting of May 20th on the issue of COLA. Hymas corrected his understanding in this respect and advised him to immediately get in contact with the trade union representatives to insure they understood the company's true position. Robinson testified that he specifically drew his uncertainty to Hymas in order to seek clarification. The very next morning Robinson attempted to locate Lemoine and reached him in the afternoon. It appears from the evidence that Robinson left Lemoine with the impression that Robinson had made a mistake and that Hymas was directing him to correct it by advising the trade union that the company's position as of June 23rd had to be revised so that there was no continuation of COLA payments in the one year agreement. It would also appear that Robinson called together the negotiating committee members without Lemoine and advised them of the same thing.

9. Currently there has been no request by either party for the release of a no-board report. Both Hymas and Robinson disclaimed any interest in seeing the employees engage in strike activity and Hymas stated that all severance obligations of the company have been calculated and monies set aside.

10. It is the complainant's submission that the respondent only revised its offer after it learned from the union that the offer was likely to be accepted by the members of the complainant. At that point, the respondent revised its offer to insure rejection and thereby avoid the entering into of a collective bargaining agreement. The complainant speculated that the respondent's intention was either to lock-out its employees and force them to seek employment elsewhere in attempt to avoid its severance pay obligations under the *Employment Standards Act* and the collective bargaining agreement or, alternatively, the company simply wanted to operate for the duration of the mine's existence without a collective bargaining agreement. It was also submitted by the trade union in a further alternative that if the respondent had genuinely committed an error on June 23rd which it was seeking to correct by revising its position, the error in and of itself constituted a breach of section 15 in that it was fundamental and caused substantial prejudice to the trade union. On behalf of the respondent company it was submitted that at most it had committed a bargaining error because of Mr. Robinson's inexperience and difficulty with the English language. It was contended that the offer made in error had not been accepted and, accordingly, the company was legally entitled to revise it and return to its real position. Counsel stressed that the error did not indicate bad faith or an intent to avoid a collective agreement.

11. A careful review of the evidence and the submissions of the parties has led the Board to conclude that Mr. Hymas did not intend to continue the COLA payment in the new agreement and that he attempted to convey this at the meeting of May 20th. It would also appear that Mr. Robinson because of his inexperience, his difficulty with the English language

and the absence of Mr. Hymas at the June 23rd meeting was mistaken in conveying the position of the company at that time. Having regard to the fact that the union did not accept that proposal, the respondent was entitled to salvage its position by notifying the trade union of the error that had been made and precisely what its real position was. While concerned over the apparent failure of Hymas to be precise over a major change in the agreement, the surrounding circumstances have led us to conclude that the complainant has not met the onus it shoulders to establish the alleged violation. We note that the parties were in a renewal situation; the economic outlook for the mine was disastrous; the respondent at no time was pushing to achieve a strike and lockout position and that it was the union that applied for conciliation. We are also mindful that both Mr. Lemoine and Mr. Robinson are relatively inexperienced negotiators and that there is no reliable written record of what Mr. Hymas said on May 20th, 1982. In such circumstances there is a tendency to hear what you want to hear. Against this background, we are satisfied that Mr. Hymas' testimony is plausible and that this plausibility was not significantly impaired by the union's evidence or cross-examination.

12. While the result of this reasoning is to dismiss the complaint, the Board urges the parties to return to the bargaining table with the assistance of the Conciliation and Mediation Branch of the Ministry of Labour and, to this end, we have released a copy of this decision to Mr. Trevor Stevenson.

#### **DECISION OF BOARD MEMBER M. J. FENWICK;**

1. I dissent.

2. In view of the disagreement by the parties as to what final agreement renewal terms each proposed, I would direct them to request a further meeting with Trevor Stevenson, the conciliation officer, for the purpose of clarifying the issues.

3. Lemoine's summary of proceedings at the May 20th negotiating meeting included reference to Hymas saying that the company's position was negative to all contract renewal items proposed by the union.

4. Hymas said the corporation was willing to renew the agreement for one year.

5. Lemoine made a point at this stage in the proceedings to suggest that the renewal would include continuing the COLA clause.

6. He testified that Hymas' response was "yes". (Company counsel observed that "if a union representative goes away from negotiations without getting something in writing he does so at his peril".)

7. This is a valid cautionary note which applies to any business transaction. However, the history of collective bargaining is replete with examples of deals being made verbally, confirmed only by a handshake.

8. Lemoine further testified that the conciliation officer summarized for the parties on July 23 the items of agreement. These were one year renewal, increase in severance pay and continuation of COLA.

9. Michel Robinson, chief company spokesman at that time, affirmed that the summary was correct.

10. In his testimony-in-chief, Mr. Hymas said he told union negotiators the company would not be looking for cutbacks in wages or benefits and that the company would agree to a one year agreement extension.

11. As a consequence of these assurances by Hymas and Robinson it is understandable that Lemoine and his committee would assume that the COLA clause would be continued for the ensuing year of the agreement.

12. In view of the disagreement by the parties as to what was decided on the COLA clause, I would direct the parties jointly to request Trevor Stevenson, the conciliation officer, to convene a further meeting for the purposes of reviewing their respective positions.

**1880-80-JD Tilechem Limited, Complainant, v. United Brotherhood of Carpenters and Joiners of America, Local 1669, Labourers' International Union of North America, Ontario Provincial District Council and The Labourers' International Union of North America, Local 607, Respondents, v. Ontario Masonry Contractors Association, Intervener.**

**Jurisdictional Dispute – Dispute over erection and dismantling of metal scaffolding between Labourers and Carpenters unions – Board assigning work to labourers on considering criteria**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *Ed Marilley for the complainant; Douglas J. Wray for United Brotherhood of Carpenters and Joiners of America, Local 1669; S. B. D. Wahl for Labourers' International Union of North America, Ontario Provincial District Council, and The Labourers' International Union of North America, Local 607; R. D. Perkins for the intervener.*

**DECISION OF IAN SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER J. WILSON; July 14, 1982**

1. This is a complaint under what is now section 91 of the *Labour Relations Act*. In April of 1980, Tilechem Limited ("Tilechem") assigned the erection and dismantling of tubular metal scaffolding on a project in Kapuskasing to members of Labourers' International Union of North America, Local 607 ("the Labourers' union"). Subsequently, the United Brotherhood of Carpenters and Joiners of America, Local 1669 ("the Carpenters' union") made a demand that the work be reassigned to its members employed as carpenters. Tilechem is bound to collective agreements with both unions. It was in response to the demand of the Carpenters' union that Tilechem filed the instant complaint.



2. The parties are in agreement that the work in dispute can be described as follows:

All tubular metal scaffolding erection and dismantling with respect to unit masonry acid resistant tank or vessel construction at the Spruce Falls Paper Mill, Kapuskasing Ontario.

3. The parties are in agreement that the Board's direction should be binding on the parties for jobs other than the one giving rise to the instant dispute, as is permitted under section 91(2) of the Act. The parties are in disagreement, however, as to the proper geographic scope of the direction. Whereas Tilechem and the Labourers' union contend that the order should cover all of Northern Ontario, the Carpenters' union takes the position that the order should be limited to the concurrent jurisdictional areas of the two locals which are before the Board. Having regard to the fact that other locals of the two unions in Northern Ontario were not on notice that they might be affected by these proceedings, the Board is satisfied that any direction in this matter should be limited to the concurrent jurisdictional areas of the two locals. This can be described as follows:

The District of Kenora (including the Patricia portion), the District of Rainy River, the District of Thunder Bay, that part of the District of Cochrane which lies north of the 49th parallel of latitude and west of the North Driftwood, Abitibi and Moose Rivers to James Bay (including the said rivers) save and except that area which lies within a radius of 81 kilometers of the Timmins Federal Building.

4. The erection of tubular metal scaffolding is essentially simple work which requires no real skill or training to perform. Members of trades such as plumbers and pipefitters frequently install their own scaffolding. On large projects where a number of trades will be working off the scaffolding, it is quite common for the general contractor to assign the work to carpenters who are assisted by labourers. The carpenters rely on this general practice in the instant case. The Labourers' union, Tilechem and the Ontario Masonry Contractors Association, of which Tilechem is a member, however, all contend that scaffold erected for the type of work in dispute is masonry scaffolding, and that it is common practice for masonry scaffolding to be erected by members of the Labourers' union who are referred to as "mason tenders".

5. The work assigned to mason tenders traditionally includes not only general labouring functions, but also keeping masons supplied with mortar, brick, tile and block. For at least twenty years it has also been a general practice to have scaffolding work on strictly masonry projects performed by mason tenders. From time to time the Carpenters' union has, on the basis of a 1920 award by the National Board for Jurisdictional Awards, claimed scaffolding work above the fourteen foot level on strictly masonry projects, but almost always without success. In the *Abe Dick Masonry Limited* case, [1971] OLRB Rep. May 432, this Board ruled that the installation of tubular metal scaffolding on a masonry project, regardless of height, should be awarded to members of the Labourers' union. A series of similar rulings have been issued by the National Labour Relations Board in the United States. See, for example, *Seedorff Masonry, Inc.*, (1968) 173 NLRB No. 184. The Nova Scotia Labour Relations Board issued a like decision in the *Miller & Hughes Limited* case, 1974, File No. 342c (Sec. 50). In the instant proceedings, the Carpenters' union agrees that it was quite proper to have scaffolding which will be used only by masons and their tenders erected by mason

tenders belonging to the Labourers' union. However, the Carpenters' union contends that since the scaffolding work in dispute was in fact used by a number of trades, including carpenters, it should have been erected by carpenters.

6. Tilechem is a Montreal based firm which specializes in the construction and repair of unit masonry acid resistant tanks and vessels. These tanks and vessels are meant to hold various solutions and, accordingly, must be acid resistant. The pulp and paper industry is a major user of these types of tanks and vessels. Some of the tanks and vessels constructed by Tilechem are fairly small "chests", many of which are located within existing buildings. However, the company is also engaged in the construction of large outdoor circular tanks which may be over 100 feet high. These tanks are generally constructed of an exterior wall of insulating block and an interior wall of acid resistant tile. Between the two walls is installed reinforcing rods. Concrete is then poured into the cavity. To avoid undue pressure on the walls of the tank, generally only about 12 to 16 inches of concrete will be poured in any one day. This fact means that each tank will be constructed at a rather slow pace and over a relatively long period of time.

7. On straight-wall tanks, the regular construction crew will consist of one or more masons and a number of mason tenders belonging to the Labourers' union. The masons lay both the blocks and the tiles. The mason tenders transport the block and tile to the masons, mix the mortar and transport it to the masons, prepare the concrete, operate a concrete pump, man the hose from the concrete pump and also perform any other labouring type work. The general practice has also been for the mason tenders to transport the scaffolding frames and put them into place in concentric rings both inside and outside of the tank as it is being constructed. The scaffolding is erected just slightly ahead of the blocks and tiles. When the tank is completed, the mason tenders dismantle the scaffolding. As the tank is being built, a crew of reinforcing rodmen will come in at intervals to install the reinforcing rods. On any one tank the rodmen might be on the site about six separate times. The rodmen work off the already erected scaffolding. On straight-wall tanks carpenters will usually be called in for the first time to build and install wooden forms for a concrete roof. Sometimes forms must also be built for haunches located near the top of the tank. In installing the forms the carpenters work off the already erected scaffolding. Further, the inner ring of scaffolding is generally used to support the wooden forms for the roof.

8. Most large tanks constructed by Tilechem and its competitors in Northern Ontario are of the straight-wall type referred to above. The instant complaint, however, arose primarily out of the construction of what is referred to as a high-density or "neck-down" tank. These tanks have a shape similar to that of an upside down milk bottle. Stock material is put into these tanks at the top at a high consistency. In the bottom or "neck" of the tank the stock is diluted and mixed with an agitator before it is used. Because of its peculiar features, a high-density tank may be able to hold the equivalent of three times the amount of stock stored in a similar size straight-wall tank.

9. Because of the shape of a high-density tank, there is a greater need for carpentry work in its construction. Trusses must be constructed and installed and then plywood placed over them to create a form for the "flareout" between the narrow "neck" of the tank and the wider upper part. This is in addition to any formwork associated with the roof and any haunches. Additional scaffolding is also required on a high-density tank. On a straight-sided tank there is generally one outer ring of scaffolding, one inner ring, and apparently often a

centre tower of heavy scaffolding used to support a lift. On the exterior of a high-density tank, however, there is generally a short ring of scaffolding used to allow work to progress on the neck portion, and a second ring from the ground to the top to allow work to be done on the major straight-wall part of the tank above the flareout portion. On occasion, a third outer ring of scaffolding is also used. Inside a high-density tank there is a short ring of scaffolding around the bottom, as well as a second ring from the top of the flareout to the top of the tank. This second ring rests on beams at the top of the flareout normally installed by carpenters. Generally, there will also be a centre tower of heavy-duty scaffolding.

10. Because of the relatively slow speed of construction, even on a high-density tank there is not enough scaffolding work to keep even one man busy doing only scaffolding on the neck-down weeks by a small crew of mason tenders. Although the evidence is not clear with respect to this point on the Kapuskasing job, on other tanks mason tenders have been assigned to do scaffolding work when they have a bit of free time from their other duties. On the Kapuskasing job a small straight-wall tank was being built at the same time as the high-density tank, and scaffolding went up on both tanks at the same time. Notwithstanding this fact, Mr. Marilley, the President of Tilechem, estimated that if carpenters had been used to install the scaffold frames on both tanks, two carpenters would have been required for three days about every two weeks to do the scaffolding. As it was, the job in question started in mid-May of 1980, with the first scaffold being erected on June 4th. Although the evidence on this point is not very clear, it appears that carpenters were on site during two weeks in July to install wooden forms for the flareout, for about a week in October to do the roof forms for both the small straight-sided tank and the high-density tank, as well as for a few days in between to install timber beams and forms for haunches.

11. Tilechem began operations in 1974. One of its first jobs was another high-density tank in Kapuskasing. In that case, a carpenter, Mr. Joe Carrier, was hired to do the forms. Mr. Carrier advised the company that it was mandatory to have a carpenter on the job, and he was kept on even when not doing the forms. Although the mason tenders did all of the scaffolding while Mr. Carrier worked on the forms, when he was not engaged on formwork, Mr. Carrier installed the scaffolding. Part of the time Mr. Carrier also operated a hoist. Partway through the project, Mr. Carrier was replaced by Mr. E. Plamondon, another carpenter. Mr. Plamondon testified that apart from the forms for the roof, all he did was install and dismantle scaffolding both on the high-density tank and a smaller indoor tank. Mr. Plamondon admitted that at times he would be doing nothing for a half hour or an hour as he waited for a mason tender to bring him scaffolding frames to put in place. Mr. Plamondon was on the job for five weeks. As we calculate it, he put in the equivalent of, at most, eleven days doing scaffolding work, and did nothing for the rest of the time. Tilechem also constructed a high-density tank in Thunder Bay in 1980. All of the scaffolding on this job was done by mason tenders. Tilechem has done a number of smaller tanks in Ontario, and for all of them has used only mason tenders for the scaffolding. On the project giving rise to this complaint, only mason tenders were assigned to do the scaffolding.

12. Two other firms are active in the construction of unit masonry acid resistant tanks in Northern Ontario, namely, Dante Gasparotto Ltd. ("Gasparotto") and Canadian Stebbins Engineering Manufacturing Co. Limited ("Stebbins"). Gasparotto is based in Thunder Bay. The firm employs carpenters to build forms and similar work. Gasparotto's consistent practice has been to assign all tubular metal scaffolding, including the tubular metal scaffolding on a number of high-density neck-down tanks, to mason tenders belonging to the Labourers' union.



13. The Stebbins firm is based in Montreal. It is by far the largest firm of its kind in Canada. Prior to 1974, the firm was the only one active in Northern Ontario in the construction of unit masonry acid resistant tanks. Prior to 1971, the company appears not to have had any set policy with respect to the erection of tubular metal scaffolding. The evidence before us indicates that prior to that time almost all tubular metal scaffolding on the firm's projects was either assigned to mason tenders belonging to the Labourers' union, or it was done by labourers in the employ of the various mills who belonged to the Lumber and Sawmill Workers' Union. Since 1971, official company policy has been to assign tubular metal scaffolding to members of Labourers' Local 607.

14. Evidence was tendered with respect to approximately twenty projects where Stebbins had built unit masonry acid resistant vessels in the geographic area under consideration. Except for the three instances more specifically referred to below where carpenters worked on the scaffolding, all of the tubular metal scaffolding was done by mason tenders or, in some instances prior to 1971, by labourers belonging to the Lumber and Sawmill Workers' Union.

15. One of the three instances where carpenters in the employ of Stebbins were used on tubular metal scaffolding was on a high-density tank in Red Rock in 1973. Three carpenters were employed on the job. The carpenters built forms for the flareout and roof and also erected a shelter comprised of wooden frames covered with plastic which they put up around the tank as protection against cold winter weather. Two of the carpenters appear to have been laid off during periods when there was no formwork or shelter work to be done. One of the carpenters, however, Mr. G. Paakkunainen, was employed continuously on the project. Mr. Paakkunainen testified before the Board. On the basis of Mr. Paakkunainen's testimony, we are led to conclude that with the help of a labourer he installed most of the scaffolding, but that there was not sufficient scaffolding work and carpentry work to keep him busy and, accordingly, he spent much of his time doing other work, including manning the hose attached to the concrete pump, working the concrete vibrator, handing tiles to a mason, and even helping with the jointing.

16. Canadian Stebbins also built a high-density tank in Marathon in 1974. Only one carpenter was employed on this job, namely, Mr. Paakkunainen, who was employed throughout the project. Mr. Paakkunainen built the formwork for the flareout with the assistance of a labourer. No roof form was used. Mr. Paakkunainen erected all of the scaffolding used on the tank with the assistance of a labourer. This work took about one day a week. During the rest of the time Mr. Paakkunainen acted as a mason tender to Mr. A. Allain, a mason who was the superintendent on the job. At times Mr. Paakkunainen also worked the concrete pump and operated the vibrator. According to Mr. Allain, Mr. Paakkunainen was an exceptional worker who "was as good as three labourers".

17. The final job done by Stebbins where a carpenter worked on tubular metal scaffolding was in Fort Francis in 1975 when two straight-sided bleach tanks were being constructed. Two carpenters were employed on the job, but only one at a time. A carpenter built the form for the roof, and the carpenters also did all of the scaffolding. The outside scaffolding was in the normal form. The inside scaffolding, however, was somewhat different. Because of the shape of one of the tanks, over the top of the scaffolding was laid a wooden floor. The interior scaffolding was moved up by tearing up the wooden floor, raising the metal scaffolding a lift, and then installing a new wooden floor. Even including the work on the wooden floor, the scaffolding work was not sufficient to keep a carpenter busy. The testimony

of Mr. M. DeGagne, one of the carpenters who was on the site, indicates that although he spent some of his time helping with the concrete pour as well as moving scaffold frames about on the ground, there were still times when he had nothing to do.

18. In determining jurisdictional claims in disputes under section 91 of the Act, the Board generally looks to the following criteria, namely:

1. Collective bargaining relationships;
2. Skill and training;
3. considerations of economy and efficiency;
4. employer practice; and
5. area practice.

The first two of these criteria do not favour either the Labourers' or the Carpenters' union. Both unions have a bargaining relationship with Tilechem, and the work does not require any real skill or training. Although prior to 1976 carpenters were at times employed to do the work, overall, both employer practice and the area practice of other firms strongly favour the Labourers' union.

19. The final criteria the Board looks to involves considerations of economy and efficiency. The erection of scaffolding on this type of project is intermittent, and there is not enough work to keep even one person busy. To assign the work to the carpenters would mean that for much of the time a carpenter would have to be specifically called in for relatively brief periods of time to do the work, perhaps for three days every two weeks. In the alternative, a carpenter would have to be permanently employed to do the work. In such a situation, the carpenter would either spend most of his time with nothing to do, or he could keep busy by primarily working as a mason tender.

20. It is true that more trades than just masons and mason tenders work off the scaffolding. However, the fact remains that the construction of unit masonry acid resistant tanks and vessels primarily involves masonry work. Carpenters and ironworkers are normally on a project for only relatively brief periods of time. Further, because the walls of the tanks must go up fairly slowly, the use of a full-time scaffolding crew, such as is done on other types of construction, would make very little sense.

21. Given all of the above, we are satisfied that it is more appropriate that the work in dispute be assigned to mason tenders belonging to the Labourers' union rather than to carpenters. Accordingly, we direct Tilechem Limited to continue to assign the erection and dismantling of tubular metal scaffolding with respect to unit masonry acid resistant tank or vessel construction, in the following geographic area to members of Labourers' International Union of North America, Local 607. The geographic area is as follows: The District of Kenora (including the Patricia portion), the District of Rainy River, the District of Thunder Bay, that part of the District of Cochrane which lies north of the 49th parallel of latitude and west of the North Driftwood, Abitibi and Moose Rivers to James Bay (including the said rivers) save and except that area which lies within a radius of 81 kilometers of the Timmins Federal Building.

## DECISION OF BOARD MEMBER H. KOBRYN;

I cannot agree with this decision when it deals with tabular metal scaffolding erection and dismantling on the construction of high-density neck-down tanks because this scaffolding is not strictly used for masonry purposes. On the neck-down tanks the scaffolding is used to support the flareout section of the neck-down tanks and also to support wood forms for the roof where the roof of the neck-down tank is poured. On the interior of the neck-down tanks the scaffolding is used to support timbers and a platform from which scaffold is built to do the sides of the tank above the flareout. Because the scaffolding on the neck-down is a multi-purpose scaffold, then carpenters should be used to build this tubular metal scaffolding in the same and efficient manner as when the assignment of work is made by a general contractor to carpenters who are assisted by labourers.

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## 0109-82-R United Steelworkers of America, Applicant, v. U S L Industries Inc., Respondent.

**Sale of Business – Whether “business” or only physical assets transferred – Whether sale of business within meaning of Act.**

**BEFORE:** E.N. Davis, Vice-Chairman, and Board Members John Murray and W.F. Rutherford.

**APPEARANCES:** J. Egner, B. Nicol, R. Hines, R. Pontieri and Burnett Shaw for the applicant; W. McNaughton and M. Fagan for the respondent.

## DECISION OF E.N. DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER J.W. MURRAY; July 9, 1982

1. The applicant seeks a declaration pursuant to section 63 of the *Labour Relations Act* that there has been a sale of business by Universal Sections Limited to U S L Industries Inc.
2. Universal Sections Limited (hereinafter referred to as “Universal”) was an operating holding company with a number of subsidiary corporation throughout Canada, United States and the United Kingdom. The Canadian subsidiaries were a mixture of manufacturing companies and distributor-type companies which latter were concentrated primarily in Western Canada and which handled the products of the major manufacturing companies. Universal operated a manufacturing plant in Markham, Ontario, which is the subject of the instant application. The Markham operation manufactured wall systems, studs, soffits and siding for the residential market and also acted as a distributor of Gypsum Board. The soffits and siding were marketed through a Universal subsidiary also located in the Markham plant. The Markham plant at one time accounted for 25-30% of the dollar sales volume of Universal, and about 40% of the Markham production was sold through other Universal subsidiaries.
3. Commencing in early 1980 Universal was experiencing financial difficulties then centred in respect to its Montreal based manufacturing subsidiaries, leading to their sale by a Trustee in bankruptcy. Also in November 1980, the Western Canada subsidiaries were sold



and the U.K. subsidiary “died a natural death”. In respect to Ontario operations, the physical assets were seized by Richter and Co. in May 1981, pursuant to their debenture and in June 1981, Peat Marwick was appointed Receiver-Manager on behalf of the Canadian Imperial Bank of Commerce. In July 1981, an application for bankruptcy was filed on behalf of the unsecured creditors by Coopers Lybrand and that application was finally granted in December 1981, retroactive to July 1981.

4. Subsequent to Peat Marwick’s appointment as Receiver-Manager, the shares of Professional Machinery and Tool Ltd., an Ontario subsidiary, were disposed of as were those of a Florida based corporation. The Ottawa Division of the Company was sold. Peat Marwick, under an arrangement with Richter and Co., continued to operate the Markham facility for a time principally to run out inventory which was sold either as finished product or ran inventory. Peat Marwick also collected the receivables. This process was completed by September 1981. During this period, it is said that the Receiver-Manager made efforts to dispose of the business as a going concern without success, and in the words of Mr. Maurice Fagan, who was then (and now) President of Universal, Richter and Co. ultimately lost patience and decided to put up the physical assets at Markham for sale by tender.

5. Sealed tenders were called, returnable on September 4, 1981, in respect to 34 parcels of assets and conditioned on “a bulk bid must include a separate allocation for each parcel”. It was Fagan’s testimony that the successful tender was submitted by Danbury Sales (1971) Ltd. and believes that that was so in respect to all parcels but he was not sure whether two parcels involving leases of premises at 60 Esna Park Drive and 10-30 Alden Road, both in Markham, were acquired by Danbury Sales.

6. On August 18, 1981, the present respondent, U S L Industries Inc. (hereinafter referred to as “U S L”) was brought into existence with Mr. Maurice Fagan as President. None of the Directors of Universal, other than Fagan, have at any time had any involvement or interest in U S L. The objective of U S L was to negotiate a purchase of equipment from Danbury Sales and to find suitable partners with financial resources to this end. The putting together of financial backing was finally accomplished and on December 14, 1981, U S L purchased most of the fixed assets consisting of machinery and equipment in the Markham plant. Fagan testified that this purchase corresponded to 27 of the parcels which had been put up for tender by Richter & Co.: the assets in the remaining parcels consisted of office furniture and fixtures, motor vehicles and the two leaseholds. Fagan also testified that there was no connection of any kind between Danbury Sales and U S L. In the transaction between Danbury Sales and U S L, U S L did not acquire the operating name, accounts receivable, goodwill, customer lists, telephone number, Universal shares, real property leases, patents or transfer of licensing agreements.

7. The landlord in respect to property at Markham in which Universal had a leasehold interest was Helter Investments Ltd. in respect to the Esna Park Drive property and Maurice Fagan as head lessee of the Alden Road property, part of which was property used by Universal. Helter Investments Ltd. was held by third parties and negotiations were conducted with Helter by the “Fagan family” which included members other than Maurice Fagan. This resulted in Helter’s leasehold interest being acquired in November 1981 by the “Fagan family”. Fagan explains the objective in these negotiations as being primarily for investment purposes; and that if U S L was ultimately successful in negotiating the purchase of assets from Danbury Sales, it would enable them to remain there, and if those purchase negotiations were not

successful, it was desired to control the whole building in any event. Helter Investments Ltd. was at that time controlled by the "Fagan family" and a 49% interest was held by Business Ventures Co. which was managed by Millard Roth and Marvin Mandell (who are now Directors of U S L) and which 49% interest is now owned by U S L. Business Ventures Co. was also the final financial backer of U S L. As part and parcel of the December 1981 transaction, a lease was entered into between Helter Investments Ltd. as landlord and U S L as Tenant. Of the five directors of Universal other than Maurice Fagan, none of them were involved with either Helter Investments or Business Ventures and have at no time been involved in U S L.

8. U S L started its operation in the Markham facility in January 1982, using the previous fixed assets of Universal as acquired from Danbury Sales. Other than Maurice Fagan, President of U S L, no persons who were officers of Universal are officers of U S L. The U S L Accountant is a new employee; the Sales Manager is a former salesman of Universal, the Plant Manager is a person who had been employed in a different capacity by Universal up to some two years ago. Additionally, in the office are two former employees of Universal working on invoices and computer work. U S L also employs two of the five former foremen of Universal and six out of twenty "bargaining unit" employees were formerly employees of Universal.

9. Since the commencement of operations in January 1982, U S L has concentrated on using the equipment to manufacture custom rolled form sections, a segment of business in which Universal had previously done little. It also produces products going into the wall system, and has produced some ceiling systems principally for customers who had previously been left with partially completed projects. Fagan explained that because of the long delay due to production interruption, the trade turned to competitive systems and it is almost impossible for U S L to get into the market with the old system. He stated that Universal had manufactured for inventory but because the Universal system was not compatible with competitive systems which the trade has been using for a year, it will be necessary to re-design. He stated there have been discussions on re-design and re-tooling for this system but the immediate priority is to build the custom cold-rolled forming business. He also stated that the U S L no longer makes steel siding and are now endeavoring to develop aluminum siding on a custom basis for other major users, and to produce for major wholesalers using the customer's materials. The soffit system is not on production but U S L makes some components not made by other manufacturing and U S L no longer acts as a distributor of Gypsum Board. He stated that many products made by U S L are generally identical to products made by Universal but also the same as those marked by other manufacturers. Fagan also stated that all materials have C.S.A. specifications and that the approvals secured by Universal in this regard were not transferred to U S L but that currently U S L is in the process of getting temporary approvals of fire testing of ceiling materials. He conceded that it was possible that some shipping cartons used by Universal could have had the letters "U S L" on them but when asked if the letters "U S L" had been synonymous with "Universal", his reply was that the word "Universal" was used as a general rule.

10. The evidence was that all customer records and accounts were retained by Peat Marwick and later by the Trustee in bankruptcy. Fagan stated that a President of Universal, he had some general knowledge of customers but no information relating to quantities or to payment patterns. He acknowledged that the current Sales Manager of U S L probably had his own customer list from the time he had worked as a salesman with Universal but pointed out that such a list was of no value under present circumstances to U S L inasmuch as it would relate to Soffitt Systems. It was stated that U S L is attempting to make sales to what had once been Universal subsidiaries and had accounted for 40% of the Markham production, but

that these accounts had, in the interim, made other arrangements and in the case of the former Montreal subsidiary was now a direct competitor of U S L.

11. The question before the Board is whether within the meaning of Section 63 of the Act there has been a sale by Universal of its business or part thereof to U S L. We have no doubt that the Markham operation itself was initially a viable, integrated business entity which was severable from Universal and capable of existing as an individual business venture, and therefore, capable of being brought within the meaning of section 63(1) of the Act which reads:

63(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

12. The issue here is whether it is the “business” of Universal which has been transferred and now is carried on by U S L or whether, as the respondent argues, it has only acquired physical assets once the property of Universal and is employing them in the conduct of a similar business. In this regard, we adopt with approval a statement made by this Board in *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193 at paragraph 44, where it was said:

“For a transaction to be considered a “sale of a business” there must be more than the performance of a like functions by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern”. A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfers *his* business. The use of the active verb and possessive pronoun is not insignificant.”

13. The instant case differs from that of *Marvel Jewelry Limited and Danbury Sales (1971) Ltd.* [1975] OLRB Rep. Sept. 733, as in that case, the nominal purchaser was not in fact the real purchaser from the Receiver-Manager. There was no evidence in the case before us that the sale and purchase transaction of September 1981 did, in any way, directly or indirectly, involve U S L, nor was there any evidence of any transaction between U S L and Universal, or U S L and the Receiver-Manager acting for Universal. It therefore becomes necessary to determine whether, in the September transaction, Danbury Sales (1971) Ltd. acquired the *business of Universal*. If it did not, it is obvious that Danbury could not transfer or sell that business to U S L. If Danbury did acquire the Universal business in September 1981, it remains a question of fact as to whether Danbury then sold the business to U S L.

14. Danbury was not before the Board in this matter and we have no direct evidence as to the nature and scope of the transaction between Danbury and Richter and Partners Inc. as Receiver and Manager of Universal. What we have is Fagan’s testimony as to the fact that



tenders were called in respect to parcels of certain assets of Universal and that Danbury was the successful tenderer, although there was uncertainty as to whether Danbury successfully tendered on the two parcels comprising the bases on the Markham property. There was evidence that, subsequent to the cessation of production at the end of August 1981, two or three Universal employees continued to be employed in the Markham premises, and that fact would seem to militate against Danbury having acquired the leases. The notice of sale by tender provided that "all tenders shall be made on and subject to the Conditions of Sale" which will be available at the time of inspection of the assets and, upon acceptance, shall constitute the Agreement of Purchase and Sale. There was no evidence of the Conditions of Sale placed before us.

15. We take it as established that Danbury in September acquired the machinery and equipment assets. We conclude that Danbury did not acquire a property interest in the manufacturing premises and there does not appear to have been any finished product or raw material inventories offered for sale by tender. Nor is there any evidence of transfer of customer lists or other forms of goodwill to Danbury or of Danbury acquiring any of the managerial skills or expertise or, of any of the former Universal employees. There is no evidence that Danbury actively operated the former business of Universal or indeed took any steps to do so. In examining the totality of the transaction, it cannot be said that the Universal business continued to function under Danbury's direction. The totality of the transaction justifies the conclusion that Danbury purchased a bundle of discrete assets which were essentially the tools of production. But as has been said by the Board on other occasions, a business consists not just of physical assets but includes the managerial and employee skills which attracts an identifiable customer group for the specific product being produced. In this sense, it is our conclusion that there was not a sale of business by Universal to Danbury within the meaning of section 63 of the Act. Having arrived at that conclusion, it follows that any transaction between Danbury and U S L could not have included the transfer of the Universal business to U S L.

16. The application is therefore dismissed.

#### **DECISION OF BOARD MEMBER W.F. RUTHERFORD:**

1. I dissent.

2. The findings of fact relating to the bankruptcy of Universal Sections Ltd., and the sale of its assets to Danbury and then to U S L are set out in the majority decision of the Board and it is unnecessary for me to repeat these findings with which I am in substantial agreement.

3. However, in light of all the circumstances of this case, I disagree with the conclusion of the Board that there was no "sale" of business of U S L within the meaning of section 63 of the *Labour Relations Act*.

4. The establishment of U S L with Mr. Fagan as its chief executive officer with the objectives of buying back Universal's assets from Danbury leads me to this conclusion. Of particular relevance is the fact that U S L was established in August, 1981, i.e. *before* the purchase by Danbury of Universal's assets in September 1981. This raises a very strong suspicion of a "deal" between Danbury and U S L such that Danbury was merely an intermediary between Universal and U S L. I would have held that these circumstances raised a presumption that Danbury was acting on behalf of U S L in purchasing these assets and that

the respondent failed to rebut this presumption insofar as it failed to present detailed evidence on the nature and scope of the transaction between Richter and Danbury.

5. My conclusion is that there was the sale of part of Universal's business to U S L through Danbury. Although this sale took the *form* of the sale of discrete physical assets it was in substance the sale of a "business". This case is on all fours with the facts in *Marvel Jewelry Ltd.* [1975] OLRB Rep. Sept. 733, where the Board held that there had been the sale of a business despite the fact that the "formal transaction may have given the appearance of a sale of assets". (At 735.) This conclusion is supported by various factors including the continuity of personnel from Universal to U S L from the highest to the lowest levels within the corporate structure, the continuity in production functions and, in particular, the obvious connection between the corporate names of Universal and U S L. In fact it is obvious that U S L was attempting to capitalize on Universal's goodwill by adopting this name. Admittedly, this goodwill may have been somewhat dissipated over the four month shutdown. Nevertheless, I cannot believe that the nexus between the corporate names of U S L and Universal is coincidental or that this name was chosen for purely sentimental as opposed to sound business reasons. I would hold that, in fact, there was a "sale" of goodwill from Universal to U S L in the form of Universal's corporate name despite the fact that this name was never the subject of a formal sale transaction between Universal and Danbury or Universal and U S L. The definition of "sale" in section 63(1) is certainly broad enough to cover the effective disposition of Universal's goodwill to U S L in this case. Indeed, it is obvious that the broad wording of this section was precisely intended to allow the Board to pierce the corporate veil and circumvent corporate chicanery in situations such as bankruptcies where the confusion ensuing from the dissolution of a corporate entity may facilitate the negation of employee's collective bargaining rights.

6. There is no doubt, viewing the evidence in its entirety, that Mr. Fagan planned to revive a viable part of Universal's operations behind a different corporate veil and that he is now taking advantage of Universal's bankruptcy to eliminate the bargaining rights of the applicant union with respect to this operation. I would have found a sale of this portion of Universal's business to U S L, in part through a formal sale of assets via Danbury, and in part through a direct transfer of goodwill, knowledge and expertise from Universal to U S L. Accordingly, I would have continued the bargaining rights of the applicant union in relation to the respondent.

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**0657-82-M** Labourers' International Union of North America, Local 506, Applicant, v. **Vanbots Construction**, Respondent.

**Construction Industry Grievance – Practice and Procedure – Newly appointed union steward discharged – Whether union estopped from appointing grievor as steward – Whether estoppel applies in labour arbitration proceedings – Whether discharge for just cause**

**BEFORE:** R. D. Howe, Vice-Chairman, and R. W. Redford and S. Cooke.

***APPEARANCES:** Chris G. Paliare, Gil Cragg and Peter Hitchin for the applicant; G. Grossman and F. Pezzelato for the respondent.*

**DECISION OF THE BOARD;** July 23, 1982

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. The grievance alleges that the respondent "failed to recognize Sam Biafore [the grievor] as the Union Shop Steward", contrary to Article 12.02 of the (June 26, 1980 to April 30, 1982) Provincial Collective Agreement (the "Agreement") that was binding upon the respondent at all material times. Article 12.02 provides:

"No discrimination shall be shown against any Union Steward for carrying out his duties, but in no case shall his duties interfere with the progress of work. It is agreed that Union Stewards may be appointed on each job of the Employer by a Business Representative of the Local Union who shall notify the job superintendent or other supervisory personnel of the Employer in charge of the job in writing or by telegram. A Union Steward shall be one of the last two (2) Employees retained on the job by the Employer provided he is competent and capable of performing the remaining work on the job. The Union Steward on each job will be responsible for reporting any disputes to the Employer and the Local Union representative, so that these can be taken up in the proper manner without delay.

The Union Steward shall not excluded from a gang for overtime work, provided he is willing and capable of performing the available work."

3. Although it is somewhat unclear from the grievance, it was common ground between the parties at the hearing of this matter that the referral pertains to the discharge of the grievor by the respondent on June 3, 1982. The applicant contends that the grievor was discharged without just cause, as required by Article 5.01 which provides, in part, as follows:

"The Union agrees and acknowledges that the Employer has exclusive rights to manage the business and to exercise such right without restriction save and except such prerogatives of management as may be modified by the terms and conditions of this Agreement. Without restricting the generality of the foregoing paragraph it is the exclusive function of the Employer:



(a) to determine qualifications, classify, transfer, hire, direct, promote, demote, lay-off, discipline, and discharge for just cause Employees and to increase or decrease or transfer working forces in accordance with the terms of this Agreement . . . .”

The respondent, on the other hand, contends that the applicant was estopped from appointing the grievor as a Union Steward and that, in any event, the grievor was justly discharged for insubordination.

4. There were a number of conflicts in the evidence given by the witnesses who testified before the Board in these proceedings. The findings of fact contained in this decision reflect the Board’s assessment of the relative credibility of those witnesses in the light of such factors as their demeanour while testifying, the consistency of their evidence, their capacity to recall events and to clearly express their recollections, their ability to avoid the influence of interest to modify their recollections, and the Board’s assessment of what is most probable under the circumstances.

5. During May of 1982, the respondent was working on two projects in the industrial, commercial and institutional (“I.C.I.”) sector of the construction industry in the Metropolitan Toronto Area, on which it was obligated by the Agreement to employ only members in good standing of the applicant (“Local 506”). One of those projects was at Scarborough General Hospital (the “Scarborough” site), and the other was at Gateway Centre (the “Gateway”) site). The respondent’s General Superintendent on those sites, which were approximately eight miles apart, was Frank Pezzelato, who has been employed by the respondent for over fifteen years. The respondent was also engaged in several residential projects on which it employed a number of labourers who had been in the employ of the respondent for many years. It was Mr. Pezzelato’s uncontradicted evidence that in order to provide continuity of employment with the respondent, those men, who were members of Local 506, transferred to Local 183 (of the Labourers’ International Union of North America), whose members the respondent was contractually obligated to employ on its residential projects, on the understanding that on the completion of those projects, they would be permitted to transfer back to Local 506 and remain in the employ of the respondent if it had I.C.I. work for them to perform. Since many of the respondent’s residential projects were nearing completion, Mr. Pezzelato wanted to be in a position to employ on the respondent’s I.C.I. projects as many of the labourers from those projects as possible, in order to retain them as employees of the respondent. Thus, he wished to avoid employing on those I.C.I. projects “new men” who could not be transferred or laid-off to make room for the labourers who were “returning” from the residential projects.

6. In mid May, Tony Fruzzese, who has been a Business Agent for Local 506 for approximately one year, attended at the Gateway site at which “five or six” members of Local 506 were employed, and asked Mr. Pezzelato if he could “take on some new labourers”. Mr. Pezzelato explained that he did not really need any more labourers because a number of the respondent’s long term employees would soon be returning from the residential projects which were nearing completion. However, he ultimately agreed to temporarily employ one more member of Local 506 at the Scarborough site, where the respondent was already employing “two or three” members of Local 506, and also agreed to employ an additional member of Local 506 at Gateway, on the understanding that the additional labourer would be employed at Gateway only on a temporary basis since Mr. Pezzelato would probably need to transfer him to Scarborough (or other sites) to do “deficiency” or other work. Accordingly, two

additional members of Local 506 commenced employment with the respondent on May 17th. On May 21st, the additional labourer who had been working at Gateway was transferred by the respondent to the Scarborough site. However, at the end of that day, he quit to return to work for his previous employer.

7. When Mr. Pezzelato was advised of that employee's departure, he telephoned Mr. Bruzzese and expressed his annoyance about the unreliability of the labourer whom Mr. Bruzzese had sent. Mr. Bruzzese, who was quite sympathetic concerning the situation, offered to send Mr. Pezzelato another man. However, Mr. Pezzelato expressed concern that he had been cautioned by his Labour Foreman that he was "going to have a problem" of not being able to transfer a new worker sent by Local 506 if the Local appointed him as a Union Steward, in view of the requirement (in Article 12.02 of the Agreement) that the Union Steward be one of the last two employees retained on the job by the employer (provided he is competent and capable of performing the remaining work on the job). Therefore, he asked Mr. Bruzzese to appoint a Union Steward from among his existing workforce "right away" rather than appointing one after a new labourer had been sent to the site. In response to that request, Mr. Bruzzese told Mr. Pezzelato that a Union Steward was not needed on the site but that if one was needed, he (Mr. Pezzelato) would be the first one to know about it. Although Mr. Bruzzese denied having done so, we accept Mr. Pezzelato's testimony that Mr. Bruzzese also assured him that a new man who had just been on the site for a few days would not be appointed as a Union Steward. On the basis of that understanding, Mr. Pezzelato agreed to employ another labourer to replace the worker who had quit. Accordingly, the grievor was sent to the Gateway site by Local 506 on May 26th. (Mr. Pezzelato requested that he be sent to the Gateway site in order to avoid the confusion which had arisen at the Scarborough site when the first "extra" labourer whom Mr. Pezzelato had agreed to hire from Local 506 had arrived at that site and been denied entry by the Site Superintendent.) The grievor continued to work at the Gateway site until the time of his discharge.

8. On June 2nd, Mr. Bruzzese was directed by the Business Manager of Local 506 to appoint the grievor as a steward at the Gateway site because he had "so many years with the Local" and "was qualified". (The grievor had been a member of Local 506 since 1951, and had been a Union Steward on "five or six other jobs".) Later that day, Mr. Bruzzese delivered to Joe Grossi, the respondent's Labour Foreman at Gateway, a letter (signed by the Business Manager) notifying the respondent of the grievor's appointment as Union Steward on that site. Although Mr. Grossi was initially pleased about the fact that a Union Steward had been appointed, when he read the letter and discovered who had been appointed, he (in the words of Mr. Bruzzese) "changed colour in the face". Mr. Bruzzese also announced the appointment to the other labourers on the site and gave the grievor a copy of the letter confirming his appointment.

9. On June 3rd Mr. Pezzelato came to the site at approximately 8:00 a.m. and discharged the grievor. It was Mr. Pezzelato's evidence that he came to the site that morning and asked the grievor to go the Scarborough site, to which the grievor replied that he was a Union Steward. Mr. Pezzelato also testified: "When he refused to go, I had no choice. You have a man on the site who won't do what you want him to do." That evidence is in direct contradiction to the evidence of the grievor who testified that when Mr. Pezzelato arrived at the site that morning, he (Mr. Pezzelato) came over to him and said: "What are you doing on my job? Get off the job. I don't want no Steward on my job. I'll get you out of here even if I have to pay you." The grievor also testified that Mr. Pezzelato neither asked him, nor told him,

to transfer to another job before discharging him that morning. Having regard to the candid and forthright manner in which the grievor gave his credible evidence concerning the events which transpired on the morning in question, we prefer his evidence to that of Mr. Pezzelato with respect to those matters. Mr. Pezzelato's highly emotional response to his discovery that the grievor had been appointed as the Union Steward at the Gateway site is confirmed by the fact that he telephoned Mr. Bruzzese early that morning and angrily berated him for appointing "the new man as a Steward on the job" at a time when he had other employees on the job who had worked much longer for him. He also told Mr. Bruzzese, "I don't want him. the new man is fired." He then hung up without giving Mr. Bruzzese any opportunity to discuss the matter.

10. Although Mr. Pezzelato's anger at the appointment of the grievor as a Union Steward by Local 506 is somewhat understandable in view of his understanding with Mr. Bruzzese, his act of summarily discharging the grievor was an unjustifiable over-reaction to the situation. Having regard to all of the evidence, we find that there was no insubordination or misconduct on the part of the grievor that justified any disciplinary action whatever, much less his discharge from employment. Thus, we find that the respondent breached the collective agreement by discharging the grievor without just cause on June 3, 1982. Accordingly, the grievor is entitled to be reinstated with full compensation for all lost wages and other benefits. However, we must also consider whether the applicant was, and continues to be, estopped from appointing the grievor as Union Steward, as contended by the respondent.

11. The doctrine of estoppel is succinctly summarized in the following passage from Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at paragraph 2:2210:

"The concept of promissory estoppel is well established at common law and has been expressed in the following way:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

One arbitrator in a recent award has summarised the doctrine in the following terms:

It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so.



The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment.

Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom. . . ."

Although the Ontario Divisional Court decision in *Re Hospital Commission, Sarnia General Hospital and London District Building Service Workers' Union Local 220, S.E.I.U.*, [1973] 1 O.R. 240, cast some doubt upon whether the doctrine of estoppel could be applied in labour arbitration proceedings, that doubt has been removed by a more recent unanimous judgment of that Court written by Osler J., who also wrote the decision in the former case: see *Canadian National Railway Co. et al. v. Beatty et al.* (1981), 34 O.R. (2d) 385. Moreover, the Board has not infrequently applied that doctrine in the context of section 124 applications; see for example, *Sinclair Welding Limited*, [1981] OLRB Rep. March 331, and *The Master Insulators' Association of Ontario, Incorporated*, [1979] OLRB Rep. Sept. 877.

12. The Board is satisfied that the aforementioned "essentials" of estoppel are present in the instant case. Mr. Bruzzese made a representation to Mr. Pezzelato that a "new man" such as the grievor, who had only been on the site for a few days, would not be appointed as a Union Steward, in view of Mr. Pezzelato's desire to retain the necessary flexibility to accommodate his long term employees who were soon to return from residential projects. In reliance upon that representation, Mr. Bruzzese agreed to hire the grievor. If the applicant were to be permitted to renege on that understanding, the respondent would suffer the very prejudice which Mr. Pezzelato was seeking to avoid, namely, being unable to transfer or lay-off the grievor to make room for the returning employees. As noted by the Board in *Sinclair Welding Limited, supra*, at paragraph 14, "the application of the principle of estoppel does not have the effect of amending a collective agreement. Rather, what it does do is prevent a party from enforcing its strict legal rights under the agreement when, because of its own conduct, it would be inequitable to allow it to do so." Thus, although the applicant had a "strict legal right" under the Agreement to appoint the grievor as a Union Steward on the Gateway site, it was precluded by the principle of estoppel from enforcing that right because it would be inequitable to allow it to do so under the circumstances, since the grievor would not have been employed by the respondent in the first place but for Mr. Bruzzese's representation that he would not be appointed as a Union Steward. Therefore, while the grievor is entitled to be reinstated as an employee of the respondent, the applicant was, and continues to be, estopped from appointing him as a Union Steward on the respondent's Gateway or Scarborough sites.

13. The Board therefore orders:

- (1) that Sam Biafore be compensated by the respondent for all lost wages and benefits sustained by him as a result of his discharge by the respondent without just cause, in breach of the Provincial Collective Agreement; and
- (2) that the respondent pay interest on the compensation for lost wages

ordered by the Board, said interest to be calculated in the manner described in Practice Note No. 13 dated September 8, 1980.

14. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

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**2681-81-R; 2682-81-R West Bend of Canada Division of Dart Industries Canada Limited, Applicant, v. United Steelworkers of America, Respondent.**

**Practice and Procedure – Termination – Board finding union's delay in bargaining excusable – Indicating that bargaining efforts of union after application filed irrelevant to exercise of discretion**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members R. J. Swenor and B. L. Armstrong.

**APPEARANCES:** *James E. Bowden, Edward V. Johnson and Tim Sandell for the applicant; C. M. Mitchell, Paul Murphy and Paul Falkowski for the respondent.*

**DECISION OF THE BOARD;** July 26, 1982

1. These matters are hereby consolidated.
2. These are applications for a declaration terminating bargaining rights brought by the employer under the provisions of section 59 of the *Labour Relations Act*. Section 59 reads:

59.-(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

3. The respondent trade union has, for a number of years, held bargaining rights for the applicant's main production facility in Barrie. In January of 1981, the respondent was certified as bargaining agent for the employees of the applicant at its foundry operation in Brampton, and its warehouse facility in Mississauga. It is these latter two bargaining units which are the subject of the present application.

4. Negotiations for a first agreement for the two new bargaining units only concluded in September of 1981. These negotiations took place on a joint basis for the two units, and the resulting collective agreements had effective dates of January 21, 1981 to January 24, 1982. Thus the collective agreements were up for renewal almost immediately upon their signing. The respondent gave notice to bargain on December 7, 1981, and the applicant wrote back on December 16th indicating its preparedness to meet. Tim Sandell, the applicant's Personnel Manager, then called the respondent in early January to discuss a timetable for negotiations. The staff representative that he spoke to, Gerry Barr, indicated that he was only filling in for staff representative Paul Falkowski, who was ill. Mr. Barr suggested that Mr. Sandell wait until Mr. Falkowski's return on January the 11th or 12th, and set up a date for a meeting with him. Sandell concurred, and on January the 13th, Mr. Falkowski did call Mr. Sandell. Mr. Falkowski explained the problems he had been having with his heart, and indicated to Mr. Sandell that he would get back to him to set up negotiations after he had had an opportunity to meet with the employees and prepare their proposals. Mr. Sandell concurred with that, and indicated to the Board that he expected to hear back from Mr. Falkowski some time in January. In fact he never did hear anything more from Mr. Falkowski directly until after the present application was filed, which was on March 25, 1982. Mr. Falkowski responded to the application immediately with the following telegram:

April 2, 1982

TO: TIM SANDELL, BRAMPTON

I HAVE CONTACTED YOUR OFFICE ON SEVERAL OCCASIONS DURING THE MONTH OF MARCH 1982. YOU HAVE NOT RESPONDED. I AM REQUESTING YOU CONTACT ME IMMEDIATELY AND ARRANGE A MEETING FOR NEGOTIATIONS. I AM AVAILABLE FOR A MEETING ON APRIL 7, 15, 16, 20 22. I AM EXPECTING AN IMMEDIATE RESPONSE.

PAUL FALKOWSKI  
STAFF REP.  
USWA  
350 Rutherford Road

Mr. Sandell consulted with counsel, however, and on April 7th advised Mr. Falkowski that in view of the present application, the company was not prepared to meet.

5. As the Board has stated many times, the purpose of section 59 is to ensure that a trade union, once clothed with bargaining rights, does not permit collective bargaining to fall into abeyance. Where a trade union does so, for a period exceeding sixty days, it may be required to come before the Labour Relations Board and satisfy the Board that it has some



reasonable justification for the delay. As the Board noted in *Oliver Lumber Company*, [1963] OLRB Rep. Aug. 280, at page 283:

In the exercise of its discretion, the concern of the Board is to ascertain whether a trade union which has acquired bargaining rights on behalf of employees has actively pursued and forwarded their interests in bargaining with their employer. An opportunity is afforded to an interested party to bring to the attention of the Board an allegation that the trade union is not carrying out its function in a proper manner and, on such application, the union may then explain its delay in commencing or continuing negotiations as the case may be.

This is obviously a position which a trade union, acting prudently, will avoid placing itself in, but it is precisely the position in which the respondent has placed itself in the case now before us. The Board, as a result, heard considerable evidence from various officials of the respondent trade union as to the difficulties it was encountering in the present set of negotiations.

6. The difficulties, in fact, trace back to the prior negotiations concluded in September of 1981. Doug Hart, the respondent's Area Coordinator, had originally assigned negotiation of the first agreements for these units to Staff Representative Ron Varley. Mr. Varley, however, was having no easy time of it. In particular, the members of his bargaining committee all resigned their positions, citing a fear of perceived harassment on the part of the company. Apprised of these problems, Mr. Hart finally decided to take the task of negotiating the first agreements upon himself, and concluded collective agreements without the presence of any committee persons at the bargaining table. Mr. Hart then replaced Mr. Varley with Mr. Falkowski, a more experienced staff representative, and assigned Mr. Barr, an experienced organizer, to service the two units as well. Mr. Hart instructed the two staff representatives, in light of the previous bargaining history, to take whatever steps were necessary to prepare negotiations.

7. On January 4, 1982, while Mr. Falkowski was still confined to his home on doctor's orders, an employee in the Brampton unit, Regina Young, attended at the respondent's offices to see Mr. Barr. Mrs. Young indicated that she had been part of a group that was considering circulating a petition to decertify the union, but that incidents occurred in the plant which caused the employees to reverse themselves and decide instead to try to solve their problems through the union. Mr. Barr and Mrs. Young discussed the problems that employees were concerned about, and the kind of contract that would be necessary to deal with them. Mr. Barr suggested that a meeting with the employees should await the return of Mr. Falkowski, but in the meantime gave Mrs. Young a supply of membership cards with which to try to generate renewed interest amongst the other employees in the unit. At the same time Mr. Falkowski, upon his return, met with Mr. Niles, an employee at the Mississauga warehouse, and discussed the bargaining proposals for that unit. There are 5 employees in the Mississauga warehouse unit. Mr. Falkowski then advised Mr. Niles that negotiations would once again be carried out on a joint basis, and that they would commence as soon as the Brampton unit was ready.

8. Mrs. Young again called Mr. Barr on January 18th, and the two of them arranged a meeting for January 28th. Mr. Barr wrote up leaflets for the meeting, and arranged for them to be distributed at the Brampton facility. The meeting was to be handled by Mr. Falkowski. Unfortunately, Mr. Falkowski understood from Mr. Barr that the meeting was to begin at 4

p.m., the employees were told that it was to begin some time later, so that when they arrived at the union hall that evening, Mr. Falkowski had already left. Mrs. Young phoned Mr. Barr the next day to find out what had happened, and the two of them arranged a further meeting at the union hall for February 4th. Mr. Barr again drew up a notice of the meeting, and delivered it to George Sanders, the applicant's general foreman at Brampton, to post on the plant bulletin board. The Brampton operation was temporarily without a plant manager at this point, and Mr. Sanders phoned Mr. Sandell at the company's head office to receive permission to post this notice. Mr. Sandell indicated to Mr. Sanders that it was proper to post the notice, and Mr. Sanders sent Mr. Sandell a copy. The notice read:

*"Important Notice*

There will be a meeting for all bargaining unit members to discuss and decide on our negotiating priorities . . .

Date      Thursday

Time      7:00 p.m.

Place      Union Hall  
350 Rutherford Road  
South (in the office mall, 1 Block west of Old Heart Lake Road  
and Steeles)

All bargaining unit members are urged to attend this important meeting."

Asked on cross-examination whether he formed any conclusions from this Notice, Mr. Sandell stated that the Notice told him that the respondent was having difficulty getting employees to a meeting, because he understood that the meeting was to have taken place in January.

9. With the January 28th meeting having been mishandled by the respondent, only two employees returned to the union hall for the meeting on February 4th. One of them was Mrs. Young, and Mr. Barr was able to convince her and the second employee to serve on a bargaining committee which would meet with the company. Mr. Barr then gave Mrs. Young the respondent's standard forms for indicating collective bargaining priorities and proposals, and instructed Mrs. Young to distribute these to the other employees in the Brampton unit. Mrs. Young shortly thereafter returned to Mr. Barr and Mr. Falkowski some 40 completed bargaining forms (there appears to have been between 40 and 60 employees in the Brampton unit at this time), and as well submitted in excess of 30 membership cards, all of which purported to come from employees in the Brampton bargaining unit. Mr. Falkowski then reviewed the responses of the employees on the bargaining priority forms, and from them drew up a set of proposals to submit to the company. Mr. Falkowski testified that he telephoned Mr. Sandell on March 1st to advise him that the union was ready to commence negotiations, but Mr. Sandell was not in his office. Mr. Falkowski testified that he left his name and telephone number with the applicant's operator, and asked that Mr. Sandell be given the message to call him. Mr. Hart testified that he became concerned when he learned that Mr. Sandell had not returned Mr. Falkowski's message immediately, because of his experience

with the applicant in the first round of bargaining, and instructed Mr. Falkowski to call him again. Mr. Falkowski testified that he did so, at least on March 9th, and that he again left a message for Mr. Sandell to call him. The applicant's evidence is that no messages from Mr. Falkowski were ever received by Mr. Sandell.

10. On March 8th, the applicant recieved a letter from the respondent advising that its bargaining-unit employees had been incorporated into a new composite Local representing employees of various companies. On March 11th, with Mr. Falkowski still not having made contact with Mr. Sandell, Regina Young walked into Mr. Falkowski's office and announced that she was unable to take the employer's harassment any longer, and had quit. She further advised that the second member of the bargaining committee was withdrawing from the committee before the same sort of things would happen to her. At that point, Mr. Falkowski testified, he realized that he was once again not in a position to meet with the company. He pointed out that his union is extremely reluctant, notwithstanding what occurred in the fall, to bargain with an employer without the presence of people having direct knowledge of the situation in the plant. He therefore drafted another notice of meeting, and obtained Mr. Sanders' approval to post it in the Brampton facility. Mr. Sandell, for his part, recalled in his testimony that George Sanders did call him to obtain approval for the posting of a second Notice, but was of the tentative view that this second incident likely occurred sometime in February as well.

11. This last Notice, in any event, announced a meeting for March 30, 1982. The meeting was scheduled to take place one hour before a meeting of the new composite local, Local 1888. Five employees from the applicant's Brampton Plant showed up at the West Bend meeting, and a bargaining committee of two was elected. Another meeting was then scheduled for April 1st at 7:30 p.m. to go over the bargaining proposals already developed, and discuss the need for any changes to them. On the afternoon of April 1st, however, the respondent received notice from the Board of the present application. Mr. Falkowski met with the employee committee as scheduled later that day and prepared a revised set of bargaining proposals. The next day he sent to the applicant the telegram already referred to earlier in the decision, in which he indicated the respondent's preparedness to meet. That is how matters stand at the present time.

12. It is clear that the respondent has not at all times acted as diligently as its own interests might have dictated. The Board does not find this to be a case, however, in which the evidence demonstrates a lack of interest at any time on the part of the respondent in pursuing its bargaining mandate. On the contrary, the respondent during this period dedicated a good deal of time and activity toward advancing the situation to the point where it could meaningfully begin to bargain for the employees. Its task was made more difficult by the health problems of Mr. Falkowski, and the expressed reluctance of employees to serve in as overt a role as member of the bargaining committee. Neither of these are matters which reasonably could be said to lie within the control of the respondent, nor for which any "fault" could be attached to the respondent. The respondent was not, in the Board's view, simply stalling for time in order to consolidate its support. The applicant argues that the respondent's delay caused prejudice to the applicant in the sense that it was unable to establish its costs for price-setting purposes, and that employees in the bargaining unit were asking about the status of negotiations. It is not without significance, however, that the applicant itself was in full awareness, through the notices it approved if nothing else, of both the respondent's continued presence on the scene and its bargaining-related activities on behalf of the applicant's



employees. Yet at no time prior to the filing of the instant application did the applicant indicate to the respondent that the status of negotiations was anything less than acceptable to it.

13. As the Board made clear in *Medi-Park Lodges Inc.*, [1979] OLRB Rep. Oct. 1007:

6. The termination of bargaining rights under section 51 is within the discretion of the Board. The purpose of the section is not to punish a union but to protect employees and employers from the hardship that can result when bargaining rights are tied up by a union that fails to discharge its responsibilities. Thus section 51 should not be applied mechanically and without regard to its purpose to insure active union representation to all employees who are subject to collective bargaining. Even where the objective conditions of section 51 are met the Board may not terminate a union's bargaining rights or order a vote when, although the union has missed the deadlines within the section, it has in fact been active in advancing the interest of the employees concerned. (*Walmer Transport Co. Ltd.* 53 CLLC ¶17,062; *Dominion Stores Ltd.* 56 CLLC ¶18,047)

And similarly, in *Dominion Window*, [1969] OLRB Rep. April 96:

9. As has been pointed out in a number of cases of this nature, section 45 should not be used to penalize the union which has failed to commence the bargaining within 60 days of giving the notice. The Board has said that the section should be used rather to afford an opportunity for an interested party to call the attention of the Board to the situation so that the Board may call upon the union to explain the delay.

In the latter case, the trade union in effect offered no explanation for its delay in presenting to the employer the bargaining proposals it had received from the employees, and the Board exercised its discretion by ordering the taking of a representation vote. Similarly, in *Moyer Sand*, [1966] OLRB Rep. March 913, the Board received no explanation as to the "difficulties" the trade union indicated were encountered in putting together a meeting of employees to formulate proposals and, having regard to the trade union's overall tardiness in pursuing its bargaining mandate, again directed the taking of a representation vote.

14. Those latter two cases are not on a parallel with the present one. The *Medi-Park Lodges Inc.* case, *supra*, is closer to this one in a number of respects, and had this to say:

9. The union should, of course, have endeavoured to confer with the employees and put its proposals in a final form for presentation to the employer within the sixty-day period stipulated in the Act. Its failure to do that is satisfactorily explained, however, by the staffing difficulties which it had at the time. A new business agent was introduced to the union's St. Catharines office during the course of the preparation of the union's proposal. That representative, Tom Small, became responsible for the negotiations, but required the assistance of Ms. M. Elhadad, a representative from the respondent's Toronto office. That fact, and the

interruption of regularly scheduled summer vacations, caused some delay in the process of consultation with the employees and the final drafting of the union's proposal.

10. In these circumstances the Board is satisfied that the union's delay has been adequately explained. More importantly, we are satisfied that notwithstanding its delay the union has consistently endeavoured to advance the interests of the employees. In these circumstances the Board should exercise its discretion in favour of preserving the union's bargaining rights. The application is therefore dismissed.

The Board in the present case as well is satisfied on the evidence that the delay which the respondent allowed to occur has been justified, within reason, and that this is not the kind of case where either the termination of bargaining rights or a representation vote is appropriate.

15. The Board notes that the respondent in this application sought to have the Board consider evidence of its conduct in representing members of the bargaining unit *after* this application was filed. In view of the Board's disposition of this application, the Board does not consider it appropriate to decide whether such evidence could ever be relevant to the question which section 59 raises. Such evidence could obviously suffer from the weakness of being self-serving in nature, and the Board notes that no previous case has been cited in which the Board has ever looked beyond the date of the application. As the Board commented in *Mohawk Engineering*, [1981] OLRB Rep. Aug. 1156, at paragraph 7:

The Board looks at the conduct of the parties during the whole period from the giving of notice to bargain to filing of the application under section 51 in order to decide how to exercise its discretion.

16. For the reasons given, however, the application is dismissed.

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**0334-82-R** Robert Watson, Applicant, v. United Electrical, Radio & Machine Workers of America (UE), Respondent, v. **Westinghouse Canada Inc.**, Intervener, v. Group of Employees, Objectors.

**Petition – Termination – Whether employer conduct tainted petition – Whether knowledge of labour Board's previous decision finding anti-union conduct by employer rendering petitions involuntary**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

**APPEARANCES:** *Michael G. Horan and Robert Watson for the applicant; V. Bjarnason, George Stevens and Earl Holmes for the respondent; Paul S. Jarvis, Gary Sparks and Ron Dolinki for the intervener; no one for the objectors.*

**DECISION OF THE BOARD;** July 30, 1982

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of section 57 of the *Labour Relations Act*. That section provides:

57. . . .

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation . . .

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

• • •

2. The applicant, Robert Watson, has been employed as a machinist for slightly less than two years in the new Perth plant which is the subject of this application. His activities in opposition to the respondent trade union began well before the present application. The respondent was certified for this plant in February of 1981, and Mr. Watson actively opposed the application for certification and appeared at the hearing.

3. Following certification, the respondent was successful in negotiating a one-year collective agreement with the intervener employer. But that apparently did not snuff out the



efforts of Mr. Watson to secure the expulsion of the respondent as bargaining agent. Mr. Watson continued during the term of the agreement to distribute leaflets against the respondent, and to arrange meetings of employees to discuss a possible decertification. The respondent, for its part, was well aware of the activities of Mr. Watson, and apparently made him a frequent subject of attack in its own propaganda material. It appears, in fact, that the employees themselves were being split into two identifiable camps, well before the circulation of the instant petitions, as there is a suggestion from the evidence that Mr. Watson and his supporters generally steered away from those employees known to support the union.

4. When the time came to apply for decertification, Mr. Watson had his wife type up a document which read:

THE ONTARIO LABOUR RELATIONS BOARD

AND

UNITED ELECTRICAL, RADIO, AND MACHINE  
WORKERS OF AMERICA (UE)

AND

WESTINGHOUSE CANADA INC.

I, \_\_\_\_\_ EMPLOYEE OF WESTINGHOUSE CANADA INC.,  
AT THEIR PERTH PLANT, WISH TO GO ON RECORD AND  
ADVISE THE ONTARIO LABOUR RELATIONS BOARD OF MY  
OPPOSITION TO THE UNITED ELECTRICAL, RADIO, AND  
MACHINE WORKERS OF AMERICA (UE), TO ACT ON MY  
BEHALF AS MY BARGAINING AGENT IN DEALING WITH  
WESTINGHOUSE CANADA INC.

DATED AT \_\_\_\_\_, This \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_

\_\_\_\_\_  
WITNESS

NAME: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_  
\_\_\_\_\_

and had large numbers of copies made for circulation. Mr. Watson himself played a very small part in the circulation of these documents, which took place roughly over the course of the first week in March. The bulk of the distribution was handled by other employees who had attended Mr. Watson's meetings, and circulation generally took place amongst friends or co-workers at a particular work-station. A number of the documents were signed in employees' cars or at home, and the remainder at employees' work-stations in the plant. Of the latter group, about half were signed during work-time, and the other half during breaks. With respect to those signed during work-time, the evidence of the employees involved was that they took care to ensure that no supervisor was present while they were engaged in this brief activity. The evidence further indicated that none of the 17 employee witnesses ever discussed the signing of these documents with any member of management, and that on any occasions when an employee did raise the subject of the union with his or her supervisor, the supervisor

stated that that was not something that the company could get involved in. There was no evidence whatever before the Board to contradict these assertions by the petitioner-witnesses. Each petitioner was in fact cross-examined at length on his/her true motivation for attempting to get rid of the respondent trade union, and such cross-examination revealed no more than a belief that the employees could do as well without a union, or a desire that the union's support be tested by way of a representation vote.

5. When Mr. Watson felt that he had obtained a sufficient number of signed petition forms, he began to seek legal assistance in the filing of the application itself. Mr. Watson had been represented by a Perth solicitor on the certification application, and had done some research on his own since that time. From discussions with a friend he came up with the name of a Toronto lawyer he knew to have acted against trade unions, but that lawyer advised him that he acted only for employers. The lawyer then referred Mr. Watson to his present solicitor. Mr. Watson testified that he recently inherited some money, and felt confident of his ability to pay his solicitor's account. The other employees testified that they had discussed the matter to some degree amongst themselves, and fully expected to contribute at a later time toward the expenses incurred by Mr. Watson. Mr. Watson also chartered a bus to take employees to Ottawa for the initial day of hearing of this application, and the witnesses had the same understanding with respect to payment for this bus when the bill is received.

6. There were approximately 55 employees in the bargaining unit at the date of the application. The petition-documents filed represent more than 45% of the employees in the bargaining unit at the time the application was filed. The petitions clearly state that the declarants no longer wish to be represented by the trade union, so that if the Board finds them to be "voluntary", the applicant will have satisfied the statutory pre-condition entitling him to a representation vote.

7. In this regard, the applicant argues that the "standard" of voluntariness is less in a termination application than in a certification application. While the applicant correctly points to previous Board cases as recognizing a distinction between the two situations, the distinction is a practical one, and it is simply inaccurate to say that the Board applies a different "standard" to each. The sole issue in any petition case, be it on certification or termination, is: Is the Board satisfied that the petition is voluntary? There is no other way of describing the question before the Board, or the "standard" that must be met. The difference between the certification and termination situations is that the Board, from a practical standpoint, is not faced with a bemusing "sudden change of heart" in termination applications, but rather can look to the experience which employees have had in being represented by a bargaining agent, together with any other intervening events, including the passage of time, to satisfy itself that the "change" in direction is not employer-motivated. As the Board put it in *Ontario Hospital Association, (Blue Cross)* [1980] OLRB Rep. Dec. 1759:

31. The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a

petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330.

8. Here the main factor upon which the respondent relies in challenging the voluntary nature of the petitions is the employees' awareness that this employer was found guilty of having moved its Hamilton operation to Perth for the purpose of ridding itself of the respondent. See, *Westinghouse Canada Inc.*, [1980] OLRB Rep April 577. The respondent argues that from this employees would know that their present efforts were consistent with those of the employer earlier, and indeed a number of the petitioners who testified agreed that that was a reasonable conclusion to draw. The witnesses denied, however, that this was a motivating factor in their own decision to bring this application. The evidence upon which the respondent relies to contradict this assertion is scant indeed.

9. The respondent relies, first of all, on the manner in which the employer altered its normal communications with employees following the initial *Westinghouse* decision, by instructing its supervisors not to discuss the question of "Union" with any employees. The employer thereby, the respondent argues, attached a stigma to the whole subject matter, rather than having its supervisors simply tell the employees to do what they wanted. The respondent argues, at the same time, that in spite of the employer's instructions, there *were* examples of supervisor comment, and that these comments influenced employees to bring the present application. The respondent points to the admissions of petitioners Vera Fanning and Hazel Ronson in support of this submission. But Hazel Ronson indicated that the "Union" discussion she had with a previous Unit Manager took place some year-and-a-half ago, and the thrust of that discussion was not explored. Vera Fanning admitted discussing the Union with her brother-in-law, who is a Unit Manager. Her brother-in-law expressed opposition to the Union. But that discussion took place prior to the Union even being certified, and also prior to the time her brother-in-law became a Unit Manager. Ms. Fanning also admitted that "the Union" had been discussed amongst her car-pool, of which Unit Manager Jim Parker is a



member, but added that Mr. Parker indicated that he, as a supervisor, wasn't affected, and expressed no opinion. The Board does not find these incidents to establish a sufficient link with management to "taint" the petitions. Nor does the Board accept the respondent's broader argument that the employer, by being "too clean", improperly influenced its employees on the question of Union representation. The supervisors' apparent demurrer on the basis that the company cannot get involved is entirely in line with the employer posture which this and other Labour Boards have consistently encouraged.

10. Mr. Bjarnason, for the respondent, goes on however to question the meaning of the word "voluntary" itself, in the context of section 57, and to ask, for example, whether a citizen who obeys the law of the land out of fear of punishment can truly be said to be acting "voluntarily". He points to the "Management Rights" clause of the collective agreement and the notice of layoff delivered to a large number of employees just prior to the petition being circulated as a reminder to employees who it is that promulgates the "law" of the work-place. Can the Board really find, he asks, in the particular circumstances of this case, that employees were capable of acting "voluntarily" when they penned their name to the petitions seeking disaffiliation with the respondent trade union?

11. In dealing with employee petitions, the Board has long ago articulated the kind of standard which the concept of voluntariness requires to be met. The Board's earliest cases are cited at length, for example, in Sack and Levinson, *Ontario Labour Relations Board Practice*, Toronto: Butterworths, 1973. For purposes of brevity, the effect of those cases is summarized, at page 108 of the text, as follows:

The Board has discounted petitions where the employer, his agents or supervisors have actively assisted in the origination or circulation of the petition or have interrogated, threatened or made promises to employees or have given benefits to them. The Board has also rejected petitions where the employer has given tacit approval to the petitioners or turned a blind eye to their activity by allowing them to hold meetings or to circulate the petition on company premises during working hours (sometimes in the very presence of supervisors) or to leave work without loss of pay to consult a lawyer or deliver the petition to the Board.

The Board recognizes that employers generally are not in favour of having to bargain with their employees through a trade union, and has recognized that employees tend to be aware of that general premises as well. See, e.g. *Dylex Limited*, [1977] OLRB Rep June 357, at page 367; *Playtex Limited*, [1972] OLRB Rep. Dec. 1027. The Board has always attempted to be realistic in this regard, while at the same time being cautious to "protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent" (*Peel Block Co. Ltd.*, 63 CLLC ¶16,227, and compare also *Pigott Motors Ltd.*, 63 CLLC ¶16,264). As the Board noted in *Cooper-Weeks Limited*, [1967] OLRB Rep. Aug. 455, at paragraph 5:

It may be that, at the time they affixed their signatures to the petition, the employees were aware of, and took into account, the apparent fact of their employer's dislike for the officials of the respondent trade union. It does not follow from this, however, that the petition itself might not constitute a voluntary expression of the employee's wishes.

And further, as the Board concluded in *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289, at paragraph 18:

. . . The issue is one of voluntary expression and if the Board is satisfied that the origination and preparation of the statement is free of employer interference and is further satisfied that each of the signatures has been obtained in circumstances which would not thwart free expression . . . the Board would be hard pressed to find that it had not been satisfied as to the voluntariness of the statement.

12. The fact of the layoff would not, in the Board's view, be something which would destroy the capacity for free expression on the part of employees, at least in the absence of additional evidence to demonstrate a reasonable connection between that and a message to get rid of the trade union. On the contrary, such a step on the part of the employer, as the "open season" for termination approaches, appears unlikely to generate either additional confidence or loyalty towards the employer at a time when employees are assessing their need for a trade union. Similarly, the maintenance at her Hamilton rate of an employee transferred from the UE plant in Hamilton (both of which the company was obliged by the Board's order in File No. 0945-79-U to do) seems hardly calculated to minimize the disparity in pay which exists between employees at that plant and the newer one opened in Perth. Nor, in view of that employee's limited role in assisting Mr. Watson in the solicitation of signatures (one other signature collected and some leaflets distributed), does the Board infer any "deal", as the respondent argues, for the company to transfer the employee from Hamilton with her Hamilton rate in return for promotion of the petition.

13. What the respondent's case really comes down to is the prior decision of the Board, in which the employer Westinghouse was found guilty of taking illegal steps to rid itself of the union. The respondent points to the fact that the company "policy" recited in the decision came not from the mouth of any first-line supervisor, but from the President of the Division himself. The respondent argues that the precedent-setting remedies which the Board ordered earlier were fine as far as they went, but that the employer must not be permitted to accomplish indirectly now what the Board sought previously to prevent it from doing directly.

14. But the employees are entitled, expressly by statute, to a say in the matter as well. The Board does not accept the respondent's submission that the Board's prior decision continues to have an "all-pervasive influence" which would remove the employees' capacity to form an independent opinion on the question of Union representation. Roughly two years had passed between the date of the Board's first decision and this application, and during that interval, significantly, the respondent was successful in obtaining sufficient membership cards to be certified without a vote by this Board, and in negotiating a first agreement for these employees. It may be that the three-year agreement which the respondent unsuccessfully sought would have enabled it to better consolidate its position; nonetheless, given the intervening events which have taken place, and the powerful array of remedies ordered in the original decision itself to counteract the effects of the unfair labour practice, the Board is of the view that sufficient time had elapsed to neutralize any negative influence from the earlier decision. For purposes of the respondent's argument, it might be noted in passing that the respondent itself chose to highlight the Board's decision in its propaganda material to employees, and that material in fact was the source of knowledge of the decision for many of the petitioners who testified before the Board. It may be, as well, that the continuing broadsides of Mr. Watson played a role in the respondent's difficulties in consolidating its

support. But the Board would be hard-pressed to say that Mr. Watson did not possess the right to continue to express his views about the Union, so long as his activities were not carried out in such a way as to cause other employees to associate them with the hand of management. The process became a political one, and one in which the respondent, it would appear from the limited evidence before us, was actively engaging. In the absence of even the slightest trace of employer misconduct subsequent to the Board's prior decision, or interference in any way in the issue of union representation which was being openly contested within this plant, the Board finds no basis on which to conclude that employees who have signified opposition to the union in this case were acting out of fear of employer reprisal.

15. The Board must conclude, therefore, on the basis of all of the evidence before it, and even taking into account the particular history of this case, that the applicant has filed voluntary significations in writing within the requirements of section 57 of the Act, and is entitled to the representation vote which that section makes available.

16. The Board accordingly directs that a representation vote be taken amongst the employees in the bargaining unit, which is described as:

All employees in the Municipality of Perth, Ontario save and except Unit Managers, persons above the rank of Unit Manager, Office, Sales and Engineering Staff, and students employed during the school vacation period, clerical staff and persons regularly employed for not more than 24 hours per week.

All employees in the bargaining unit as of the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Westinghouse Canada Inc.

18. The matter is referred to the Registrar.

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**0703-82-U Wharton Industrial Developments Ltd., Applicant, v. Wally Reinsons, Ron Smith et al., Respondents.**

**Construction Industry – Strike – Plumbers union on lawful strike setting up picket line – Other tradesmen employed by sub-contractors honouring line – Whether concerted refusal to work within definition of strike**

**BEFORE:** R. A. Furness, Chairman.

**APPEARANCES:** *Brain P. Smeenk, R. Wharton and D. Wharton for the applicant; L. C. Arnold, David Johnson and Sean O’Ryan for the respondents.*

**DECISION OF THE BOARD;** July 27, 1982

1. The applicant has requested relief under section 135 of the Act. In a decision dated July 15, 1982, the Board dismissed this application and stated that written reasons would be given.

2. The applicant is the owner and general contractor of a project known as the Renaissance Hotel which is located at the intersection of Kennedy Road and Highway 401 in the Borough of Scarborough in Metropolitan Toronto. This project involves the refinishing and expansion of an existing hotel. On this project the applicant has used both unionized and non-unionized sub-contractors.

3. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the “UA”) and its local trade unions have been engaged in a lawful strike with respect to the industrial, commercial and institutional sector of the construction industry throughout Ontario since May 25, 1982. This strike has affected the completion of plumbing work performed by Sikora Mechanical (“Sikora”) with members of Local 46 of the UA. Local 46 of the UA satisfied itself that during the lawful strike the work which was to have been performed by its members as employees of Sikora has been performed non-unionized employers using non-unionized employees. Local 46 of the UA appealed to the Toronto and Central Ontario Building and Construction Trades Council (the “Council”) for the sanctioning of a picket line which was to be maintained by members of Local 46 of the UA. After investigating the facts upon which Local 46 of the UA relied, the Council sanctioned the picket line.

4. The picket line commenced on July 7, 1982, and remained in effect until at least July 12, 1982. This picket line was generally respected by the employees on the project. Most of the employees respected the picket line from its inception on July 7. However, other employees completed work as a matter of safety or with regard to potential damage which the applicant might suffer before respecting the picket line.

5. At various stages of the hearing, the applicant withdrew its request for relief against certain named respondents. Having regard to the stages at which such requests were made, the Board dismisses this application in so far as it relates to the following persons:

J. Jugloff  
T. Jugloff  
Donald Linthwaite  
Jaime Garxon

Walter Cadena  
Jose Paez  
Donato Stante  
Gino Stante

Wally Reinsons  
Ron Smith and  
Matt Davidson.

6. The remaining respondents are carpenters; labourers; sheet metal workers; marble, tile and terrazzo workers; electricians, painters and bricklayers. These respondents are covered by collective agreements which were in effect on July 7, 1982, and at all material times thereafter. In these circumstances these respondents would not be in a position to engage in a lawful strike with respect to the project. There are two issues to be considered by the Board. Firstly, did the respondents engage in an unlawful strike? Secondly, if the respondents engaged in an unlawful strike; should the Board, in the exercise of its discretion, grant the remedy requested by the applicant?

7. In section 1(1)(o) of the Act, "strike" is defined as follows:

1(1)(o)

"strike" includes a cessation of work, refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

It is necessary for the Board to determine whether the respondents refused to perform work in accordance with a common understanding. It was strenuously argued on behalf of the respondents that each employee who refused to cross the picket line did so as a personal decision and as a matter of union solidarity. It was argued that in these circumstances there could be no "common understanding". This issue was canvassed by the Supreme Court of Canada in *International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al.* 78 CLLC ¶14,171, where Estey, J. indicated that the cessation of work with a common understanding might be considered as stemming from the universally understood doctrine of union solidarity, namely, opposition to choosing a legally constituted picket line. The evidence before the Board established a realistic and accurate expectation that the picket line sanctioned by the Council would be respected by the respondents. The Board is satisfied that the "in accordance with a common understanding" has been established.

8. The question of whether there was a cessation of work, a refusal to work or to continue to work requires consideration of the circumstances surrounding the maintenance of the picket line. The representatives of the sub-contractors who employed the respondents learned of the imminence or presence of the picket line from representatives of some of the trade unions, from supervisors on the site and from some of the respondents. The sub-contractors immediately adopted measures to re-assign their workforces. Whenever possible employees were directed to other projects, permitted to take vacations, given work at a sub-contractor's residence or, rarely, sent home for a few days. The Board finds that, in anticipation of the picket line or upon being informed of its existence, the sub-contractors did not schedule work so as to work on the project. It appeared to the Board that a great deal of empathy existed in the sub-contractors towards the situation of Sikora and the members of Local 46 of the UA. The Board finds that since the sub-contractors decided not to schedule work during the maintenance of the picket line there was no cessation of work, refusal to work or to continue to work by the respondents. Accordingly, the respondents have not engaged in a strike within the meaning of section 1(1)(o) of the Act.

9. In these circumstances, it is not necessary for the Board to arrive at any conclusion with respect to the issue of whether the Board should exercise its discretion and grant the

remedy requested by the applicant. It was argued on behalf of the respondents that the Board ought not to issue a cease and desist order against the respondents and any other employees to whom notice or knowledge of the Board's direction shall come from engaging in an unlawful strike and forthwith return to work as scheduled at the project. It was the position of counsel for the respondents that such an order would mean the end of a civilized way of orderliness in maintaining peace in the construction industry and would lead to chaotic picketing and possibly violence. Counsel stressed that the present system of picketing was designed to protect contractors and members of trade unions unless the contractor was performing the work of employees engaged in a lawful strike with other employees. Counsel pointed out that the applicant is not normally engaged in the construction industry and should not be permitted to undermine a system of conduct for the construction industry which is regulatory, orderly and civilized in its application.

10. The Board has exercised its discretion under section 135 of the Act and not issued an order where an employer moved prematurely before the Board, see *Maitland Redi-Mix Concrete Products Limited* [1980] OLRB Rep. December, 1751, and where the conduct of an employer's solicitor has been facetious and provocative the Board has issued an order which was to be reviewed after a period of three weeks, see *Pigott Construction Limited* [1976] OLRB Rep. April, 160. In the instant case, counsel for the respondents is raising arguments which may be described as aspects of the social purpose of a system of conduct. The Board acknowledges that the Council's private regulation of picketing has had the effect over the years of greatly limiting the number of picket lines and unlawful strikes in Metropolitan Toronto and in adjacent areas. The evidence before the Board also indicates that the policy of the Council is generally understood and supported by members of trade unions and their employers. It remains for a future application to balance the private regulation of picketing by the Council where an unlawful strike has occurred in the context of the provisions of the Act and the discretion of the Board thereunder.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1982

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**2411-81-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Cara Operations Limited Urban Restaurant Division and Retail Stores Division, (Respondent).

Unit #1: "all employees of the respondent's Retail Stores Division working at Union Station in the City of Toronto save and except supervisors, persons above the rank of supervisor, management trainees, office, accounting and support staff, person regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (47 employees in unit).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*).

Unit #3: (*See Applications for Certification Dismissed — No Vote Conducted*).

**2530-81-R:** Canadian Paperworkers Union, (Applicant) v. Abitibi-Price Fine Papers a division of Abitibi-Price Inc., (Applicant) v. United Paperworkers International Union, (Intervener).

Unit: "all employees of the respondent at Abitibi-Price Fine Papers Division, Thunder Bay, Ontario, save and except salaried foremen, supervisors, office, and sales staff, persons above the rank of salaries foreman and supervisor, watchmen and persons covered by subsisting collective agreements between the respondent and Canadian Paperworkers Union, Local 239, International Brotherhood of Electrical Workers, Local 1565, International Union of Operating Engineers, Local 865, and Office and Professional Employees, International Union, Local 236." (305 employees in unit). (*Having regard to the agreement of the parties*).

**2670-81-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. CN Tower Ltd., (Respondent).

Unit: "all employees of the respondent at the CN Tower in the City of Toronto save and except office staff, clerical staff and sales staff, assistant supervisors, persons above the rank of assistant supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement with CN Tower Restaurant Limited." (13 employees in unit). (*Having regard to the agreement of the parties*).

**0056-82-R:** Canadian Union of Public Employees, (Applicant) v. The Grove-Arnprior & District Nursing Home, (Respondent).

Unit #1: "all employees of the respondent in the Town of Arnprior, save and except department heads, persons above the rank of department head, registered nurses, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Subsequent to a Post-Hearing Vote*).

**0111-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1316, (Applicant) v. Can-Am Acoustics Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and



except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, and the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**0143-82-R:** Canadian Union of United Brewery, Flour Cereal, and Distillery Workers, (Applicant) v. Exbridge Beverages Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Exbridge, Ontario, save and except foremen, those above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (64 employees in unit). (*Having regard to the agreement of the parties*).

**0193-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mastercraft Bridge & Engineering Construction (Ottawa) Limited, (Respondent).

Unit: #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foreman." (7 employees in unit).

**0278-82-R:** Canadian Guards Association, (Applicant) v. Sudbury Investigation & Security Services Ltd., (Respondent).

Unit: "all security guards employed by the respondent at Elliot Lake, save and except supervisors and those above the rank of supervisor." (9 employees in unit). (*Having regard to the agreement of the parties*).

**0283-82-R:** Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, (Applicant) v. 337079 Ontario Limited o/a Fast Service Terminals, (Respondent) v. Association of Warehousing and Shipping Employees, (Intervener).

Unit: "all employees of the respondent in the City of Mississauga save and except supervisors and persons above the rank of supervisor, office and sales staff." (18 employees in unit). (*Having regard to the agreement of the parties*).

**0289-82-R:** The Canadian Union of Township Employees, C.N.T.U., (Applicant) v. The Corporation of the Township of Manitouwadge, (Respondent).

Unit: "all employees of the respondent at the Township of Manitouwadge, save and except foremen, persons above the rank of foreman, office and clerical staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

**0306-82-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Ramada Inns (Ontario) Limited, (Respondent).

Unit #1: "all employees of the respondent in North Bay, save and except department heads, persons above the rank of department head, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (44 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in North Bay regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except department heads and persons above the rank of department head.” (48 employees in unit). (*Having regard to the agreement of the parties*).

**0309-82-R:** Christian Labour Association of Canada, (Applicant) v. Owen Sound Nursing Homes Limited, (Respondent).

Unit #1: “all employees of the respondent in Owen Sound, Ontario, save and except administrator, director of nurses, activity director, registered and graduate nurses and office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (18 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Owen Sound, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except administrator, director of nurses, activity director, registered and graduate nurses and office staff.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**0316-82-R:** Canadian Union of Public Employees, (Applicant) v. York Mills Day Nursery School Ltd., (Respondent).

Unit: “all employees of the respondent at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**0319-82-R:** Service Employees Union, Local 204, (Applicant) v. York County Hospital Corporation (Respondent).

Unit: “all employees of the respondent at Newmarket regularly employed for not more than twenty-four (24) hours and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduates nursing staff, undergraduate nurses, paramedical employees, office staff and persons covered by subsisting collective agreements.” (150 employees in unit). (*Having regard to the agreement of the parties*).

**0332-82-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Canadian Mini-Warehouse Properties Limited, (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except the assistant area manager, persons above the rank of assistant area manager, office and sales staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**0333-82-R:** Christian Labour Association of Canada, (Applicant) v. Perma Mix Limited, (Respondent).

Unit: “all employees of the respondent at St. Catherines save and except foremen, persons above the rank of foreman, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**0335-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Les Construction Vican Incorporated; and Lemay Construction Ltee., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all carpenters’ apprentices in the employ of the respondent in that portion of the District of Cochrane north of the 50th parallel of latitude excluding the industrial, commercial and institutional

sector, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**0336-82-R:** Retail, Wholesale and Department Store Union, A.F.L.:C.I.O.:C.L.C., (Applicant) v. Belarus Equipment of Canada Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (18 employees in unit). (*Having regard to the agreement of the parties*).

**0339-82-R:** United Electrical, Radio and Machine Workers of America, (UE), (Applicant) v. Canada Dominion Battery Manufacturers and Service Company Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Halton Hills, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (19 employees in unit). (*Having regard to the agreement of the parties*).

**0344-82-R:** Labourers’ International Union of North America, Local 607, (Applicant) v. Lemay Construction Ltee. Les Constructions Vican Inc., (Respondents).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in unit).

**0350-82-R:** Ontario Public Service Employees Union, (Applicant) v. Norfolk Association for the Mentally Retarded, (Respondent).

Unit: “all employees of the respondent employed at Simcoe, Ontario, save and except Director of Residence, Manager, ARC Industries; Executive Director and office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

**0354-82-R:** Bricklayers and Allied Craftsmen International Union of America Local #4 Ontario, (Applicant) v. Sossio Ricci Brick and Block, (Respondent).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in The Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**0356-82-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Jen-Sar Warehousing Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent working at Sault Ste. Marie, save and except foremen, those above the rank of foreman, office and sales staff, those persons regularly employed for not more than



twenty-four hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**0358-82-R:** Ontario Nurses’ Association, (Applicant) v. Canadian Red Cross Society Ontario Division — Red Cross Hospital, Burk’s Falls, Ontario, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Burk’s Falls, Ontario, save and except the nurse administrator, persons above the rank of nurse administrator and persons regularly employed for not more than twenty-four (24) hours per week.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**0364-82-R:** Service Employees Union, Local 204, (Applicant) v. Runnymede Hospital, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four hours (24) per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office staff and persons covered by subsisting collective agreements.” (24 employees in unit). (*Having regard to the agreement of the parties*).

**0371-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Damore Bros. Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit). (*Having regard to the agreement of the parties*).

**0373-82-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Hillel Lodge also known as the Ottawa Jewish Home for the Aged, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Ottawa, save and except professional medical staff, head nurse, persons above the rank of head nurse, persons regularly employed for not more than twenty-four (24) hours per week and persons covered by subsisting collective agreements.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**0381-82-R:** Canadian Union of Public Employees, (Applicant) v. Yorklea Children’s Lodges Incorporated (Respondent).

Unit: “all employees of the respondent at 67 Everett Crescent and 207 Roxton Road in Metropolitan Toronto, save and except assistant superintendent, those above the rank of assistant superintendent, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (47 employees in unit).

**0391-82-R:** Teamsters, Chemical, Energy and Allied Workers Local Union 424, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Applicant) v. Diversey Environmental Products Inc., (Respondent).

Unit: “all employees of the respondent at Mississauga, Ontario, save and except foremen, persons

above the rank of foreman, office and sales staff.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**0420-82-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. Karvon Construction Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**0422-82-R:** Christian Labour Association of Canada, (Applicant) v. H. Z. & S. Management Inc., (Respondent).

Unit: “all employees of the respondent at its Harrow Tube Division, Harrow, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*).

**0449-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Lemay Construction Ltee. Les Constructions Vican Inc., (Respondent).

Unit: “all employees of the respondent employed as truck drivers working at and out of Detour Lake, Campbell Rd Lake Mines, save and except foremen and persons above the rank of foreman.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**0450-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Les Constructions Vican Inc. Lemay Construction Ltee., (Respondent).

Unit: #1: “all employees engaged in the operation of cranes, shoves, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit).

Unit #2: “all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the respondent in that portion of the District of Cochrane north of the 50th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in unit).

**0460-82-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. The Tyrren Group Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**0480-82-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Metro Painters and Paperhanging Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (32 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (32 employees in unit).

**0484-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Modular Plan-Design Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters’ apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**0485-82-R:** Canadian Union Of Public Employees, (Applicant) v. Noel Ambulance Service Ltd., (Respondent).

Unit: “all employees of the respondent at Hawksbury, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant manager and those above the rank of assistant manager, and office staff.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**0489-82-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Standard Drywall, (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit). (*Clarity Note*).

**0499-82-R:** International Association of Bridge, Structural and Ornamental Ironworkers Local 721, (Applicant) v. Purton Construction Co., (Respondent).

Unit #1: “all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Clarity Note*).

Unit #2: “all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, and Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Clarity Note*).



**0515-82-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Primo Painting Company Limited, (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**0533-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Gazzola Paving Limited, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all employees of the respondent in the Regional Municipality of Durham (Except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**0568-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Cook Brothers Northam Sand & Gravel Limited, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2291-81-R:** Utility Workers of Canada, (Applicant) v. The Public Utilities Commission of the Borough of Scarborough, (Respondent) v. International Brotherhood of Electrical Workers, Local 636, (Intervener) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Hydro Division, Water Works Division and Garage Division in the following classifications as listed in the collective agreement: (*Hydro Division*) Sub-Foreman — Line Maint. & Const. Journeyman Lineman, Apprentice Lineman; Truck Driver, Classes

“A”, “B” and “C”; Groundman, Classes “A”, “B” and “C”; Sub-Foreman, Meter Repairs Journeyman, Meter Technician, Meter Technician Apprentice; Meter Installer, Classes “A”, “B” and “C”, Meter Reader Truck Driver, Meter Reader, Classes “A”, “B” and “C” Systems Operator, Systems Operator Apprentice; Sub-Foreman, General Service, General Servicemen, Classes “A”, “B” and “C”; Inspector; Senior Stockkeeper, Stockkeeper, Classes 1, 2 and 3; Truck Driver Street Light Patrol; Meter & Delay Lead Technician, Meter & Relay Technician, Classes “A”, “B” and “C”, Meter & Relay Technician Apprentice; Sub-Foreman — Sub-Stations, Journeyman, Sub-Stations, Sub-Stations Apprentice; Sub-Station Attendant; Labourers; Construction Clerk; *Water Works Division*, Serviceman, Classes “A”, “B” and “C”; Meter Tester, Classes “A” and “B”, Meter Tester Helper; Stores Truck Driver; *Garage Division*, Mechanic, Apprentice Mechanic; General Maintenance; Lubricator.” (247 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	246
Number of persons who cast ballots	237
Number of spoiled ballots	001
Number of ballots marked in favour of applicant	125
Number of ballots marked in favour of intervener	111

**2292-81-R:** Utility Workers of Canada, (Applicant) v. The Public Utilities Commission of the Borough of Scarborough, (Respondent) v. International Brotherhood of Electrical Workers, Local 636, (Intervener).

Unit: “all office employees of the respondent in the following classifications as listed in the collective agreement: Mail Clerk; Rodperson, Billing Clerk Grade 2; Messenger-Driver, Clerk Grade 3, File Clerk, Cashier Clerk, Billing Clerk Grade 3; Clerk-Typist, Applications Clerk, Receptionist Clerk; Switchboard Operator, Caretaker, Receptionist-typist, Junior Draftsperson, Customer Data Clerk, Billing Clerk Grade 5, Engineering Clerk, Tracing Clerk; Construction Clerk, Meter Reader Clerk, Key Type & Verifier Operators, Payroll Clerk, Billing Clerk Grade 6, Stationery & Printing Clerk, Programmer-Trainee; Customer Service Clerk, Water Heater Clerk, Inventory Clerk, Senior Construction Clerk, Collection Clerk, Junior Technician, Intermediate Draftsperson, Stores Record Clerk, Clerk Grade 2, Computer Operator, Billing Clerk Grade 7, Cashier, Expeditor, Counter Clerk; Senior Collection Clerk, Senior Payroll Clerk, Senior Water Heater Clerk, Clerk Grade 1, Inspection Clerk (New Services), Senior Billing Clerk, Senior Cashier, Senior Customer Service Clerk, Junior Programmer, Assistant Buyer; Miscellaneous Accounts Receivable & Claims & Costing, Accounts Payable & Control, Programmer, Senior Computer Operator, Buyer; Intermediate Technician, Bookkeeper, Programmer/Analyst, Senior Draftsperson; Senior Technician.” (148 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	149
Number of persons who cast ballots	137
Number of ballots marked in favour of applicant	100
Number of ballots marked in favour of intervener	37

**0146-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Stead & Lindstrom (1977) Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman.” (2 employees in unit).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

**0168-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Concrete Walls Lakehead Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman." (2 employees in unit).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

**0169-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. R. Corazza Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, water-proofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, water-proofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, the District of Kenora including the Patricia Portion, save and except non-working foremen, and persons above the rank of non-working foreman." (14 employees in unit).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

**0250-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Projecta Engineering & Construction Inc., (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, water-proofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing water-proofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman." (5 employees in unit).

Number of names of persons on list as originally prepared		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	1	



## Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**2411-81-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Cara Operations Limited Urban Restaurant Division and Retail Stores Division, (Respondent).

Unit #2: "all employees of the respondent's Retail Stores Division working at Union Station in the City of Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, management trainees, office, accounting and support staff." (34 employees in unit).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	6	

Unit #1: (See *Bargaining Agents Certified No Vote Conducted*)

Unit #3: (See *Applications for Certification Dismissed — No Vote Conducted*).

**0056-82-R:** Canadian Union of Public Employees, (Applicant) v. The Grove-Arnprior & District Nursing Home, (Respondent).

Unit #2: "all employees of the respondent in the Town of Arnprior regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department heads, registered nurses and office staff." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	8	

Unit #1: (See *Bargaining Agents Certified No Vote Conducted*).

**0208-82-R:** United Associated of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, (Applicant) v. J. D. Esson Plumbing & Heating Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Number of names of persons on list as originally prepared		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	3	

**0342-82-R:** United Food and Commercial Workers International Union, Local 1000A, AFL-CIO-CLC, (Applicant) v. Panache Rotisseurs Inc., operating under the name and style of St. Huberts Bar-B-Q., (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except manager, assistant manager, dining room manager and persons above those ranks." (31 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	3	

### Applications for Certification Dismissed — No Vote Conducted

**1033-81-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Monte Carlo Carpenter, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

**2014-81-R:** International Ladies' Garment Workers' Union, and Harwill Originals Limited, carrying on business under the registered name and style of Golden Crown Sportswear, and Rosengarten, Freedman Knitting Co. Ltd., carrying on business under the registered name and style of Golden Crown Knitting Co., (Respondents).

**2382-81-R:** The International Ladies' Garment Workers' Union, (Applicant) v. The Signal Shirt Company Limited, (Respondent).

**2411-81-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Cara Operations Limited Urban Restaurant Division and Retail Stores Division, (Respondent).

Unit #1: (See *Bargaining Agents Certified — No Vote Conducted*).

Unit #2: (See *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

**2453-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Eagre Developments, Eagre Holdings Limited, Highgate Homes Limited, (Respondents).

**2529-81-R:** International Association of Machinists and Aerospace Workers, (Applicant) v. Sonora Cosmetics Inc., (Respondent).

**0077-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Schenker Warehousing a Division of Schenker of Canada Limited, (Respondent) v. Group of Employees (Objectors).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1651-80-R:** Amalgamated Clothing and Textile Workers Union, (Applicant) v. Chandelle Fashions Ltd., (Respondent) v. International Ladies Garment Workers Union, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foreman and foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (74 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	63	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	47	
Ballots segregated and not counted	4	

**2657-81-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Metro Concrete Floors Inc., (Respondent) v. O.P. & C.M.I.A. Local 598, (Intervener).

Unit: "all working foremen, journeymen and apprentice cement masons and waterproofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen and apprentice cement masons and waterproofers in the employ of the respondent in all other sectors in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham." (18 employees in unit).

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	11

**2673-81-R:** United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Limited, (Respondent) v. International Brotherhood of Painters and Allied Trades, Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades Local 1904, (Interveners).

Unit: "all employees of the respondent engaged in hydrojet and wet and dry vacuum cleaning working in and out of the respondent's office in Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff." (26 employees in unit).

Number of persons on list as originally prepared	25
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	6
Number of segregated ballots cast by persons whose name appear on voters' list	12

**0122-82-R:** Canadian Union of Public Employees, (Applicant) v. People Care Centres Inc., (Respondent).

Unit: "all employees of the respondent in the Town of Tavistock, save and except supervisors, persons above the rank of supervisor, registered nurses, and office and clerical staff." (74 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	76
Number of persons who cast ballots	67
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	48

**0124-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Construction Forming Systems Ltd., (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman." (10 employees in unit).

Number of names of persons on list as originally prepared	4
Number of persons who cast ballots	3



Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	2

**0249-82-R:** Labourers' International Union of North America, Local 506, (Applicant) v. April Waterproofing Limited, (Respondent) v. O.P. & C.M.I.A. Local 598, (Intervener).

Unit: "all working foremen, journeymen, apprentices cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foreman, and persons above the rank of non-working foreman." (5 employees in unit).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	3

**0251-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. A. J. Wing & Sons Construction Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River and the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	2

**0252-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Nu-West Development, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River and the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared	2
Number of persons who cast ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	0

**0254-82-R:** Canadian Paperworkers Union, (Applicant) v. Domtar Packaging Containerboard Division, (Respondent) v. International Union of Operating Engineers, (Intervener).

Unit: "all employees of the respondent Domtar Packaging Limited who are the Locomotive Engineer and those in the Steam and Recovery Plants within the mill properties at Red Rock, Ontario and which appear listed in Appendix A attached to the Agreement and forming part of it. The line of demarcation between the mill Local Unions shall be in accordance with established jurisdictional lines." (41 employees in unit). (*Having regard to the agreement to the parties*).

Number of names of persons on list as originally prepared by employer		41
Number of persons who cast ballots		40
Number of ballots marked in favour of applicant	00	
Number of ballots marked in favour of intervener	40	

**0281-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Charterways Transportation Limited, (Respondent).

Unit: "all employees of the respondent at or out of Mississauga, Ontario, save and except mechanics, dispatcher, and persons above the bank of dispatcher, and office staff." (157 employees in unit).

Number of names of persons on revised voters' list		159
Number of persons who cast ballots		121
Number of ballots marked in favour of applicant	47	
Number of ballots marked against applicant	68	
Ballots segregated and not counted	6	

## Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**2073-81-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. C S P Foods Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the township municipality of the Township of Flamborough, save and except supervisors, persons above the rank of supervisor, office and sales staff persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (51 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots		45
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	33	

**2677-81-R:** Labourer's International Union of North America, Local 506. (Applicant) v. Builders Supplies Company (Respondent).

Unit: "all employees of the respondent working at the employer's yards located at 8 Bram Court, Brampton, and 80 Howden Road, Scarborough, save and except yard manager, persons above the rank of yard manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		22
Number of persons who cast ballots		22
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	14	

**2712-81-R:** United Steelworkers of America, (Applicant) v. Uni-Flo Systems Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Uni-Flo Systems Incorporated in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (20 employees in unit).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	11	

**0191-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. W. W. Contractors A Division of Wither Industries, (Respondent) v. Group of Employees, (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	4	

**0305-82-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Beatrice Foods (Ontario) Limited, (Respondent) v. Model Dairy Workers Union, (Intervener).

Unit: "all employees of the respondent in its Model Dairy Division at Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week students employed during the school vacation periods." (48 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		46
Number of persons who cast ballots	45	
Number of ballots marked in favour of applicant	19	
Number of ballots marked in favour of intervener	26	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0421-82-R:** United Brotherhood of Carpenters and Joiners of America Local 1988, (Applicant) v. Westeinde Construction Ltd., (Respondent).

**0462-82-R:** International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Leisure Dynamics of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

**0477-82-R:** The United Headwear, Optical and Allied Workers Union of Canada Local 3, (Applicant) v. Biltmore-Stetson of Canada Limited, (Respondent) v. Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1270-81-R:** United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Hope-Loch Construction and Thorold Construction Ltd., (Respondents).



SALE OF A BUSINESS

**1680-81-R:** International Ladies Garment Workers' Union, (Applicant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

**1712-81-R:** Retail, Commercial and Industrial Union Local 206 Chartered by the United Food and Commercial Workers International Union C.L.C.-A.F.L.-C.I.O., (Applicant) v. John Lester Drugs Ltd., (Respondent). (*Dismissed*).

**2661-81-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, (Applicant) v. Emrick Plastics Inc., (Respondent). (*Respondent*). (*Granted*).

**0507-82-R; 0508-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Uxbridge Beverages Limited and/or Highland Beverages Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1673-81-R:** Sharon Hill and Solange Denault, (Applicants) v. The Office and Professional Employees International Union Local 151 A.F.L.-C.L.C., (Respondent) v. Anson General Hospital, (Intervener).

Unit: "all employees of Anson General Hospital engaged in office work; specifically engaged in occupations Clerk and Junior Clerk, save and except the administrator's secretary, 58 Anson Drive, Iroquois Falls, Ontario, in the Township of Calvert, in the District of Cochrane." (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**2378-81-R:** Ms. Donna Toulouse, For: Bargaining Unit #43 Ontario Public Service Employees Union, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Ontario Metis and Non Status Indian Association, (Intervener).

Unit: "all employees of the Ontario Metis and Non Status Indian Association working in the Province of Ontario, save and except the President, Vice-President, Secretary-Treasurer, Programme Directors, Assistant Programme Directors, Executive Assistant to the Executive Committee, Executive Secretary to Executive Committee, and Head of Financial Service." (11 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		7
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	6	

**2484-81-R:** Jeagan N. Mohan, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. RSLs Inc., (Intervener) v. Employees, (Objector).

Unit: "all employees of the intervener employed at Riverdale Socio-Legal Services in the Municipality of Metropolitan Toronto, Ontario, save and except staff lawyers and those above the rank of staff lawyer." (4 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots		4
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	2	

**2580-81-R:** Mike Cottrill (on behalf of a Group of employees at Ontario Hydro), (Applicant) v. Office & Professional Employees International Union, (Respondent) v. Ontario Hydro, (Intervener) v. Group of Employees, (Objectors).

Unit: "all clerical office employees of the Construction Field Forces of its Generation Projects Division and the Lines and Stations Construction Department of the Transmission Systems Division, except: (a) employees whose headquarters and usual place of work are the Head Office and the Ontario Hydro Service Centre; and (b) employees who at April 30, 1953, possessed full regular status." (11 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		320
Number of persons who cast ballots		301
Number of ballots marked in favour of respondent	53	
Number of ballots marked against respondent	245	
Ballots segregated and not counted	3	

**2615-81-R:** John D. Weed, (Applicant) v. Local #419 Teamsters, (Respondent) v. Browning-Ferris Industries, (Intervener). (*Dismissed*).

**0142-82-R:** Neil Edward Whittaker, (Applicant) v. International Brotherhood of Electrical Workers 804 (A. R. Milne Electric Ltd.) (Respondent). (*Dismissed*).

**0148-82-R:** The Corporation of the Township of Amherst Island, (Applicant) v. Ontario Public Service Employees Union, (Respondent). (*Withdrawn*).

**0345-82-R:** Irma C. Krippendorff, (Applicant) v. Local 183, Service Employees International Union, (Respondent) v. Richard S. Bond, Administrator of Westgate Nursing, (Intervener). (*Withdrawn*).

**0432-82-R:** E. Harris Company, Division of Sherwin-Williams Canada Inc., (Applicant) v. Teamsters, Chemical, Energy and Allied Workers, Local Union 441, (Respondent). (*Withdrawn*).

**0439-82-R:** Bert Drewes, (Applicant) v. Algamated Clothing & Textile Workers, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

**0407-82-U:** Sarnia Construction General Contractor Association, (Applicants) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663, (Respondent). (*Granted*).

**0440-82-U:** Mechanical Contractors Association Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Sikora Mechanical Ltd., and Adam Clark Co. Ltd., (Respondents). (*Granted*).

**0441-82-U:** Mechanical Contractors Association Ontario: Mechanical Contractors Association-Zone 7-Kitchener, (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527; J. Porter (Respondents). (*Granted*).

**0444-82-U:** Mechanical Contractors Association Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 56, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and W. A. Stephenson Construction Co. Ltd., (Respondents). (*Granted*).

**0596-82-U:** Mechanical Contractors Association Ontario; Mechanical Contractors Association Sault Ste Marie-Zone 2, (Applicants) v. United Association of the Plumbing and Pipe Fitting Industry of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508; M. Jolie; Wilhac Inc., (Respondents). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2040-80-U:** United Steelworkers of America, (Complainant) v. Fotomat Canada Limited, (Respondent). (*Granted*).

**0290-81-U; 0426-81-U:** Edgar Cowie, (Complainant) v. Local 1285, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), (Respondent) v. Chrysler Canada Limited, (Intervener). (*Dismissed*).

**1681-81-U:** International Ladies Garment Workers' Union, (Complainant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondents) v. Group of Employees, (Objectors). (*Granted*).

**1883-81-U:** International Ladies Garment Workers' Union, (Complainant) v. Josh Industries Incorporated, (Respondent). (*Withdrawn*).

**2225-81-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Judricks Enterprises Limited, (Respondent). (*Dismissed*).

**2240-81-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant) v. Judricks Enterprises Limited, (Respondent). (*Granted*).

**2272-81-U:** United Steelworkers of America, (Complainant) v. Conair of Canada Ltd., (Respondent). (*Withdrawn*).

**2295-81-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Dominion Dairies Limited, (Respondent). (*Terminated*).

**2328-81-U:** The International Ladies' Garment Workers' Union, (Complainant) v. The Sigal Shirt Company Limited, (Respondent). (*Dismissed*).

**2420-81-U:** Teamsters, Local 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. K Mart Canada Limited, (Respondent). (*Granted*).

**2519-81-U:** Ontario Nurses' Association, (Complainant) v. Golden Plough Lodge, (Respondent). (*Withdrawn*).

**2616-81-U:** Service Employees Union, Local 183, (Complainant) v. Telecopy Systems Limited, (Respondent). (*Withdrawn*).



**2625-81-U:** Labourers' International Union of North America, Local 607, (Complainant) v. D. R. McCormick Electric Limited, Clow Darling Mechanical Contractors Ltd., Tamarron Construction Limited, Tamarron Group Inc., T-2 Rentals Ltd., (Respondent). (*Dismissed*).

**2631-81-U:** The International Ladies' Garment Workers' Union, (Complainant) v. The Sigal Shirt Company Limited, (Respondent). (*Dismissed*).

**2662-81-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, (Complainants) v. Emrick Plastics Inc., (Respondent). (*Dismissed*).

**2698-81-U:** Service Employees International Union, Local 210, (Complainant) v. University of Windsor, (Respondent). (*Withdrawn*).

**0097-82-U:** Paul Cadieux and Germain Picard, (Complainants) v. Labourers' International Union of North America, Local 527, (Respondents). (*Withdrawn*).

**0238-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Windsor Machine & Stamping Limited, (Respondent). (*Withdrawn*).

**0239-82-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. Promotional Packaging Products Limited, (Respondent). (*Withdrawn*).

**0274-82-U:** James Patrick Nugent, (Complainant) v. Shopmen's Local 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Respondent). (*Withdrawn*).

**0280-82-U:** General Workers Union, Local 1030 of the U.B.C. and J. of A., (Complainant) v. Labourers' International Union of North America, Local 527, (Respondent). (*Withdrawn*).

**0290-82-U:** United Food & Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Cooley Metal Products Limited, (Respondent). (*Withdrawn*).

**0329-82-U:** United Food and Commercial Workers International Union, Local 725, (Complainant) v. Michel's Baguette French Bakery and Cafe, (Respondent). (*Withdrawn*).

**0337-82-U:** Ontario Public Service Employees Union, (Complainant) v. Brant County Ambulance Service Limited, (Respondent). (*Withdrawn*).

**0352-82-U:** Canadian Guards Association, (Complainant) v. Sudbury Investigation & Security Services, (Respondent). (*Withdrawn*).

**0355-82-U:** Nand Kishore Bhalla, (Complainant) v. Local Union 1031, (Respondent). (*Withdrawn*).

**0377-82-U:** United Steelworkers of America, (Complainant) v. Irwin Toy Limited, (Respondent). (*Withdrawn*).

**0385-82-U:** Canadian Union of Public Employees, (Complainant) v. The Disabled and Aged Regional Transit System, (Respondent). (*Withdrawn*).

**0402-82-U:** Antonio Rodriguez Melo, (Complainant) v. Muris Building Systems A Division of Collavino Incorporated, (Respondent) v. Chatham Construction Workers Association of Canada, Local #53, affiliated with the Christian Labour Association of Canada, (Intervener). (*Withdrawn*).

**0403-82-U:** Antonio Rodriguez Melo, (Complainant) v. Elric Contractors of Wallaceburg, Limited and Chatham Construction Workers Association, Local #53 affiliated with the Christian Labour Association of Canada, (Respondent). (*Dismissed*).

**0405-82-U:** Donald D. David, (Complainant) v. Canadian Guards Association and its Local 101, (Respondent). (*Withdrawn*).

**0419-82-U:** Germain Picard, (Complainant) v. Labourers International Union of North America, Local 527, (Respondent). (*Withdrawn*).

**0424-82-U:** Orval W. Wood, (Complainant) v. General Motors Corp., (Respondent). (*Withdrawn*).

**0425-82-U:** Tomassini Serafina, (Complainant) v. O'Donnell Joe, Ontario Retail Council, (Respondent). (*Withdrawn*).

**0435-82-U:** Terry Davey, (Complainant) v. C.U.P.E. #16, (Respondent) v. Clarence S. Dungey, (Intervener). (*Withdrawn*).

**0472-82-U:** Peter George (Complainant) v. Babcock & Wilcock Industries Ltd., United Steelworkers of America Local 2859, (Respondents). (*Withdrawn*).

**0481-82-U:** Ken Maruk, (Complainant) v. Caravelle Foods, (Respondent). (*Withdrawn*).

**0544-82-U:** International Union of Allied Novelty and Production Workers, Local 905, (Complainant) v. Leisure Dynamics of Canada Ltd., (Respondent). (*Withdrawn*).

**0574-82-U:** Hotels, Clubs, Restaurants, Taverns Employee's Union Local 261, (Complainant) v. Beacon Arms Hotel-Rodas Investments Ltd., (Respondent). (*Withdrawn*).

**0587-82-U:** International Union of Allied Novelty and Production Workers, Local 905, (Complainant) v. Leisure Dynamics of Canada Ltd., (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0375-82-M:** Glendale Spinning Mills (1981) Ltd., (Employer) v. Amalgamated Clothing and Textile Workers and its Local 1070-T, (Trade Union). (*Granted*).

**0497-82-M:** Essex International of Canada Limited, (Employer) v. International Association of Machinists & Aerospace Workers, Lodge No. 2245, (Trade Union). (*Granted*).

## **JURISDICTIONAL DISPUTES**

**0903-81-JD:** Sheet Metal Workers' International Association, Local 30, (Complainant) v. Mead Steel Erectors and Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, -66, 681, 1133, 1304, 1747, 1963, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America, (Respondents). (*Withdrawn*).

**2581-81-JD:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, (Applicant) v. Ontario Hydro and The International Association of Bridge, Structural and Ornamental Iron Workers, Local 736, (Respondents). (*Dismissed*).

**0075-82-JD:** United Association, Local 800 and The Ontario Pipe Trades Council, (Complainants) v. The Mechanical Contractors Association of Sudbury, Comstock International Limited and Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America, (Respondents). (*Dismissed*).

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**1626-81-M:** Health, Office & Professional Employees, (Applicant) v. The Northumberland & Newcastle Board of Education, (Respondent). (*Dismissed*).

**1886-81-M:** Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Vagden Mills Limited, (Respondent). (*Granted*).

**2462-81-M:** Canadian Union of Public Employees Local 115, (Applicant) v. The Corporation of the City of Brockville, (Respondent). (*Withdrawn*).

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**

**2471-81-OH:** Alan Destroismaisons and Gary Keroff, (Complainants) v. Engelhard Industries of Canada Limited, (Respondents). (*Withdrawn*).

**0098-82-OH:** Vic Hammond, George Metro, Joseph Gixti, (Complainants) v. Sidbec-Dosco Inc., 1020 Martin Grove Road, Rexdale, Ontario M9W 4W2, (Respondent). (*Withdrawn*).

**0398-82-OH:** William Douglas, (Complainant) v. Richard Hook (Dean of Dept.) and Derwyn Shea (Chairman of Dept.) Humber College of Applied Arts and Technology, (Respondents). (*Withdrawn*).

**0423-82-OH:** Larry A. Dumais, (Complainant) v. Chemical and Petroleum Waste Disposal Ltd., (Respondent). (*Withdrawn*).

**0437-82-OH:** Tim Kovach, (Complainant) v. Peter Vloet; and P.C. Drop Forgings Ltd., Port Colborne, Ontario, (Respondent). (*Withdrawn*).

**0438-82-OH:** Dave Woodrich, (Complainant) v. Kendan Manufacturing, (Respondent). (*Withdrawn*).

## **COLLEGES COLLECTIVE BARGAINING ACT (Unfair Labour Practice)**

**2593-81-M:** Ontario Public Service Employees Union, (Applicant) v. Fanshawe College, (Respondent). (*Withdrawn*).

## **CONSTRUCTION INDUSTRY GRIEVANCES**

**0640-81-M:** The Carpenters' District Council of Toronto, and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Spalson Limited, (Respondent). (*Granted*).

**0666-81-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mead Steel Erectors, (Respondent). (*Withdrawn*).



**1271-81-M:** United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Thorold Construction Ltd., (Respondent). (*Withdrawn*).

**2200-81-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Comstock International Ltd., (Respondent). (*Dismissed*).

**2451-81-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Applicant) v. Dominion Bridge Company Limited, (Respondent). (*Dismissed*).

**0222-82-M:** Millwright District Council of Ontario; and Mill-wright Local 1425, United Brotherhood of Carpenters and Joiners of America, (Applicants) v. Lummus Canada Inc., (Respondent). (*Withdrawn*).

**0284-82-M:** United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Applicant) v. Vaino Sarkka Construction (Curtiss Hawk), (Respondent). (*Granted*).

**0299-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ian Sommerville Construction Ltd., (Respondent). (*Granted*).

**0338-82-M:** International Union of Operating Engineers Local 793, (Applicant) v. Arlington Crane Service Ltd., (Respondent). (*Granted*).

**0395--82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. North York Drywall and Acoustic Systems, Division of 458921 Ontario Limited, (Respondent). (*Withdrawn*).

**0400-82-M:** International Union of Elevator Constructors Local #50, (Applicant) v. Canadian Escalator & Elevator Service Company Limited, (Respondent). (*Withdrawn*).

**0401-82-M:** International Union of Elevator Constructors, Local #50, (Applicant) v. Ajax Elevator Limited, (Respondent). (*Withdrawn*).

**0410-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. C.E. Canada Superheater (Red Rock), (Respondent). (*Withdrawn*).

**0412-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

**0413-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

**0414-82-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Reliable Insulation, (Respondent). (*Withdrawn*).

**0453-82-M:** International Union of Elevator Constructors, Local #50, (Applicant) v. F. & K. Elevator Services Limited, (Respondent). (*Withdrawn*).

**0457-82-M:** Drywall, Acoustic, Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Columbia Interior Contracting, (Respondent). (*Withdrawn*).

**0458-82-M:** Drywall, Acoustic, Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Columbia Interior Contracting, (Respondent). (*Withdrawn*).

**0487-82-M:** Operative Plasterers' and Cement Masons' International Association, Local 172, (Applicant) v. Warren Steeplejacks Limited, (Respondent). (*Withdrawn*).

**0495-82-M:** United Brotherhood of Carpenters and Joiners of America Local Union 2041, (Applicant) v. Robert McSeveney (M & W Lathing), (Respondent). (*Withdrawn*).

**0496-82-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041, (Applicant) v. Nation Drywall Contractors Ltd., (Respondent). (*Withdrawn*).

**0514-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mollenhauer Ltd., (Respondent). (*Granted*).

**0518-82-M:** Local 666, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. E.S. Fox Limited, (Respondent). (*Granted*).

**0540-82-M:** The Ontario Pipe Trades Council and The United Association of the Plumbing and Pipefitting Industry, Union 666, (Applicant) v. Janzen Plumbing and Heating Limited, (Respondent). (*Granted*).

**0541-82-M:** Local 666, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council, (Applicant) v. E.S. Fox Limited, (Respondent). (*Granted*).

**0583-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Blier Inc., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**2323-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Traugott Construction Limited, (Respondent). (*Denied*).

**0470-81-OH:** Ted Nickarz, (Complainant) v. Union Minere Explorations and Mining Corporation, (Respondent). (*Denied*).

**0089-81-R:** Local 47 Sheet Metal Workers' International Association, (Applicant) v. Irvcon Roofing & Sheet Metal (Pembroke) Ltd., (Respondent). (*Denied*).

**2436-81-M; 2437-81-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Yellow Jacket Welding Company Limited, (Respondent). (*Denied*).

**2480-81-R:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. The Corporation of the City of Brockville, (Respondent) v. Canadian Union of Public Employees, (Intervener). (*Denied*).

**0305-82-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Beatrice Foods (Ontario) Limited, (Respondent) v. Model Dairy Workers Union, (Intervener). (*Denied*).

## DESIGNATION BY MINISTER

**2629-81-M:** International Association of Bridge, Structural, and Ornamental Iron Workers, Local Unions 721, 736, 759, 765, and 786, (Local Unions) v. International Association of Bridge, Structural and Ornamental Iron Workers, (International Association) v. Iron Workers District Council of Ontario, (District Council). (*Dismissed*).





*Ontario Labour Relations Board,  
400 University Avenue,  
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